Supreme Court, U.S.
FILED

(1)

No. 03-74 JUL 10 2003

In The

Supreme Court of the United States

PAW PAW'S CAMPER CITY, INC.,

Petitioner,

v.

JAMES V. JIMENEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

LARRY G. CANADA
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
701 Poydras St., Suite 4040
New Orleans, Louisiana 70139
Telephone: (504) 525-6802
Facsimile: (504) 525-2456
Attorneys for Petitioner Paw Paw's Camper City, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

144 pp

QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in affirming an $80,000 punitive damage award to stand against Paw Paw's Camper City, though no compensatory damages were awarded by the jury, and only nominal damages of one dollar were awarded via additur by the presiding Judge in post-trial motions, when that judgment is in conflict with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, binding United States Supreme Court decisions of *BMW North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S Ct. 1513, ___ L.Ed.2d ___, 2003 WL 1791206 (2003), and decisions in the Fifth Circuit, like *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000).

2. Whether the decision of the Fifth Circuit Court of Appeals in this matter should be allowed to stand despite its advancement of an inter-circuit conflict regarding the interpretation and enforcement of *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996).

LIST OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and corporations have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. **Paw Paw's Camper City, Inc.**, Petitioner;
2. **W. B. Herring, Jr., Owner**, Paw Paw's Camper City, Inc., Petitioner;
3. **Matt Margetta**, past owner and General Manager, Paw Paw's Camper City, Inc., Petitioner;
4. **Larry G. Canada**, attorney for Petitioner, Paw Paw's Camper City, Inc.;
5. **Doris T. Bobadilla**, attorney for Petitioner, Paw Paw's Camper City, Inc.;
6. **James V. Jimenez**, Respondent;
7. **James Christian Lewis**, attorney for Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner, Paw Paw's Camper City, Inc. discloses that it is a closely held corporation, that it is not a publicly traded entity, and that there is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF INTERESTED PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vi
COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW	1
JURISDICTION	3
STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF ISSUES PRESENTED	7
STATEMENT OF THE FACTS	8
REASONS FOR GRANTING THE WRIT	10
I. The Decision of the Fifth Circuit Court of Appeals is in direct conflict with the Supreme Court's binding decision in *BMW v. Gore*, as clarified by *State Farm Mutual Automobile Insurance Company v. Campbell*, and as previously followed by the Fifth Circuit in *Louisiana ACORN Fair Housing v. LeBlanc*, and as such the punitive damage award at issue is excessive and in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States	12

TABLE OF CONTENTS – Continued

Page

II. As the question of proportionality and relationship between compensatory and punitive damages is currently an area of inter-circuit conflict, the Fifth Circuit's decision in this case increases confusion and conflict among the Circuits, instead of creating uniformity... 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES:

BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (1996) ..... *passim*

Kolstad v. American Dental Ass'n., 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) 19, 20

State Farm Mutual Automobile Insurance Company v. Campbell, ___ U.S. ___, 123 S.Ct. 1513, ___ L.Ed.2d ___ (2003) ..... *passim*

OTHER CASES:

Ad-Vantage Telephone Directory Consultants Inc. v. GTE Directories Corp., 943 F.2d 1511 (11th Cir. 1991) 29

Baker v. John Morrell and Co., 2003 WL 21355198 (N.D. Iowa 2003) 27

Cush-Crawford v. Adchem Corp., 271 F.3d 352 (2nd Cir. N.Y. 2001) 19, 27

Deffenbaugh-Williams v. Wal-Mart, 156 F.3d 581 (5th Cir. 1998) 24, 25

Farapella-Crosby v. Horizon Health Care, 97 F.3d 803 (5th Cir. 1996) 21

Hennessey v. Penril Datacom Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) 22, 24

Hardin v. Caterpillar, Inc., 227 F.3d 268 (5th Cir. 2000) 21

Kerr-Selgas v. American Airlines Inc., 69 F.3d 1205 (1st Cir. 1995) 29

TABLE OF AUTHORITIES – Continued

Page

Louisiana ACORN Fair Housing v. LeBlanc, 211 F.3d 298 (5th Cir. 2000) 7, 10, 12, 25, 26

McClain v. Metabolife Int'l, Inc., 2003 WL 1961344 (N.D.Ala. 2003) 17

Ogle v. Salamatof Native Ass'n, Inc., 906 F. Supp. 1321 (D. Alaska 1995) 11

Parrish v. Sollecito, 2003 WL 1905613 (S.D.N.Y. 2003) 27

Timm v. Progressive Steel Plating Inc., 137 F.3d 1008 (7th Cir. 1998) 28

UNITED STATES CONSTITUTION:

Fifth Amendment 6, 7, 11, 12

Fourteenth Amendment 6, 11, 12

STATUTES:

28 U.S.C. § 1254(1) 3

28 U.S.C § 1291 3

28 U.S.C § 1294 3

28 U.S.C. § 1331 ..... 1, 3

42 U.S.C § 1981 ..... *passim*

42 U.S.C § 2000(e) *et seq* 1, 3, 4, 5

Fed. R. App. P. 3 (2002) 2

Fed. R. App. P. 4(a) (2002) 2

Fed. R. Civ. P. 50(b) (2002) 1, 9

Fed. R. Civ. P. 59 (2002) 1, 9

TABLE OF AUTHORITIES – Continued

Page

RULES:

Fifth Circuit Local Rule 35 3

United States Supreme Court Rule 10(a) 7

United States Supreme Court Rule 10(c) 7

United States Supreme Court Rule 13 2

OTHER:

Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring Juries?, 54 Mercer Law Review 1081 (Spring 2003) 27

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Paw Paw's Camper City (hereinafter "Paw Paw's"), respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

This case was originally filed in the United States District Court for the Eastern District of Louisiana alleging claims under 42 U.S.C. § 2000(e) and 42 U.S.C. § 1981, presenting matters of federal question jurisdiction pursuant to 28 U.S.C. § 1331.

On November 13-16, 2001, the parties tried this matter before a jury. Jimenez presented several claims, including allegations of racial discrimination, hostile work environment, and constructive discharge. The jury found that Paw Paw's did not constructively discharge or racially discriminate against Jimenez; however, the jury found that Jimenez was subjected to a hostile work environment. The jury did not award compensatory damages, but did award punitive damages in the amount of $161,000.00. On November 21, 2001, the Clerk of Court entered the judgment of the court. (App. at 63a)

On November 27, 2002, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, Paw Paw's filed its Motion for Judgment as a Matter of Law, in the Alternative, Motion for New Trial, and in the Further Alternative, Motion for Remittitur. Additionally, Jimenez filed a Motion

for Post-judgment Relief, as well as a Motion for Attorney's Fees and Costs.

On February 22, 2002, the trial court ruled on both parties' post-trial motions and entered its Order and Reasons. The trial court ordered Jimenez's Motion for Post-judgment Relief granted in part, awarding nominal damages of $1.00, and denying it in all other respects. The trial court also ordered Paw Paw's post-trial motion granted in part, ordering a remittitur of the punitive damage award, or if plaintiff refused to accept a remittitur, a new trial on punitive damages only. On February 25, 2002, the trial court entered an Amended Judgment, reducing punitive damages to $80,000.00. (App. at 61a-62a) The trial court then entered judgment in favor of Jimenez in the amount of $70,785.00 in attorney's fees and $2,395.97 in costs, together with legal interest from the date of entry of judgment.

On March 15, 2002, pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, the Notice of Appeal required by the Federal Rules of Appellate Procedure Rule 3 was timely filed with the district clerk. On March 27, 2002, Jimenez filed a Notice of Cross-Appeal. After briefs were timely filed, oral argument was held on March 10, 2003. The Fifth Circuit issued its unpublished decision affirming the trial court on March 17, 2003. (App. at 1a-2a)

Petitioner timely filed a Petition for Rehearing En Banc in the Fifth Circuit Court of Appeals on March 31, 2003. The Petition for En Banc Rehearing was denied on April 17, 2003. (App. at 64a-65a) Consequently, this Petition for a Writ of Certiorari has been timely filed, pursuant to Rule 13 of the Rules of the United States

Supreme Court, within 90 days after the entry of judgment denying the Petition for Rehearing En Banc by the Fifth Circuit Court of Appeals.

JURISDICTION

This case was originally filed in the United States District Court for the Eastern District of Louisiana alleging claims under 42 U.S.C. § 2000(e) and 42 U.S.C. § 1981, presenting matters of federal question jurisdiction pursuant to 28 U.S.C. § 1331. The Fifth Circuit Court of Appeals had jurisdiction over the original appeal pursuant to 28 U.S.C. §§ 1291 and 1294. The Fifth Circuit Court of Appeals also had jurisdiction to grant, or deny, a Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35 and Fifth Circuit Local Rule 35. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This appeal addresses the claim with which the Respondent has prevailed in the proceedings thus far, hostile work environment, which was brought pursuant to 42 U.S.C. § 2000e-2 *et seq.* (App. at 75a-76a), which reads, in pertinent part, as follows:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer –
>
> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This appeal also addresses the punitive damage award to the Respondent which was rendered, despite an initial award of no compensatory damages and a final award of only nominal compensatory damages, pursuant to 42 U.S.C. § 1981(a), which reads, in pertinent part, as follows:

> Damages in cases of intentional discrimination in employment
>
> (a) Right of recovery
>
> (1) Civil rights
>
> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. §§ 2000e-2 or 2000e-3 or 2000e-16] and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in

subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

> **(B)** in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> **(C)** in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> **(D)** in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Additionally, this appeal will address cases decided by this Honorable Court on grounds of Fourteenth Amendment Due Process violations which, by extension, have application in federal matters through the corresponding Due Process provision of the Fifth Amendment. The Fifth Amendment to the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF ISSUES PRESENTED

Petitioner, Paw Paw's Camper City, by and through its attorney, Larry G. Canada, files this Petition for a Writ of Certiorari, on issues relevant according to United States Supreme Court Rules 10(a) and 10(c), and thereby will respectfully show the Court as follows:

1. The Fifth Circuit Court of Appeals' decision of March 17, 2003, affirming an $80,000.00 punitive damage award against Paw Paw's Camper City, though no compensatory damages were awarded by the jury, and only nominal damages of one dollar were awarded through additur by the presiding Judge in post-trial motions, is excessive and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. Further, that decision is in conflict with case law within the Fifth Circuit, *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000), and with binding decisions of this Court, *BMW North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and *State Farm Mutual Automobile Ins. Co. v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513, ___ L.Ed.2d ___ (2003). Therefore, consideration of this case

through a writ of certiorari, in order to clarify the existing split in authority, is prudent and necessary to secure and maintain uniformity of the Court's decisions.

2. As noted herein, Paw Paw's respectfully suggests that the Fifth Circuit Court of Appeals, in its panel decision and through denial of the Petition for En Banc Rehearing, furthered an inter-circuit conflict and thereby advanced a question of exceptional importance among the Federal case law, thus qualifying this case for review on a writ of certiorari, upon judicial discretion.

STATEMENT OF THE FACTS

On March 26, 1996, Paw Paw's General Manager and part owner, David Jimenez, James V. Jimenez's brother, also Mexican-American (now deceased), hired James Jimenez ("Jimenez"). Jimenez was originally hired as a salesman in the Picayune, Mississippi store. On July 2, 1996, Jimenez was promoted to Closer/Manager and transferred to the Gulfport, Mississippi store. After sales declined and other managerial problems occurred, Jimenez was transferred to a number of stores, ultimately settling in the Hammond, Louisiana store as Store Manager. Paw Paw's General Manager, Matt Margetta (close personal friend of David Jimenez and the Jimenez family) counseled Jimenez on a regular basis and encouraged him to improve his job performance. Jimenez continued his inadequate job performance by failing to timely and properly file paperwork, failing to respond to business correspondence, and displaying poor management skills.

Jimenez's sales figures also continued to decline. Eventually, because Jimenez persisted in this lack of productivity and inability to fulfill the responsibilities of his position, he was demoted to Sales Manager. On July 19, 1999, Jimenez resigned, without notice.

Jimenez originally filed suit alleging that during his term of employment at Paw Paw's, he was subjected to a hostile work environment and constructive discharge because of his Hispanic race and Mexican national origin. In his amended complaint, Jimenez alleged that he was also subjected to individualized disparate treatment based on his race.

On November 13-16, 2001, this matter was tried before a jury. At that trial, Jimenez presented several witnesses to support his allegations of racial discrimination and hostile work environment. In its defense, Paw Paw's presented witnesses who testified that no such discrimination occurred. The jury rendered a verdict in favor of Paw Paw's on the claims of constructive discharge and racial discrimination and in favor of Jimenez on the hostile work environment claim. The jury went on to award Jimenez no compensatory damages while at the same time awarding him punitive damages in the amount of $161,000.

Following entry of the verdict by the Clerk of Court and pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, Paw Paw's filed its Motion for Judgment as a Matter of Law, in the Alternative, Motion for New Trial, and in the Further Alternative, Motion for Remittitur. Additionally, Jimenez filed a Motion for Post-judgment Relief, and for attorney's fees and costs. On February 22, 2002, the trial court ruled on both parties' post-trial

motions and entered its Order and Reasons. The trial court ordered Jimenez's Motion for Post-judgment Relief granted in part, awarding nominal damages of one dollar, but denied it in all other respects. Further, the trial court ordered Paw Paw's post-trial motion granted in part, ordering a remittitur in the punitive damage award, or if plaintiff refused to accept a remittitur, a new trial on punitive damages alone. Subsequently, on February 25, 2002, the trial court entered an Amended Judgment, reducing punitive damages to $80,000.00. The trial court also awarded to Jimenez the amount of $70,785.00 in attorney's fees and $2,395.97 in costs, together with legal interest from the date of entry of judgment, as to plaintiff's hostile work environment claim. Finally, the court entered judgment in favor of Paw Paw's, dismissing all other claims asserted by plaintiff, with prejudice.

REASONS FOR GRANTING THE WRIT

The central issue here is whether an award of punitive damages that clearly falls outside of the guidelines of this Court will be allowed to stand. The Fifth Circuit Court of Appeals upheld the order of the presiding Judge by allowing an $80,000.00 punitive damage award to stand in conjunction with the nominal damage award of one dollar. Paw Paw's Camper City, contends that the punitive damage award is excessive and disproportionate in light of the United States Supreme Court's decision in *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), the recent and illuminating decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513, ___ L.Ed.2d ___ (2003) and the Fifth Circuit's decision in *Louisiana ACORN Housing v. LeBlanc*, 211 F.3d

298 (5th Cir. 2000). By disregarding these binding decisions, the Fifth Circuit Court of Appeals has created a split of authority within the Fifth Circuit and has fostered confusion as to the application and appropriate interpretation of the *BMW* decision. Fortunately, the recent decision of *State Farm* has operated to clarify any confusion that may have frustrated the application of *BMW*. Unfortunately, the Fifth Circuit did not have the benefit of *State Farm* when it considered this matter originally. Granting of a writ is necessary to ensure the fair application of due process.

Though both *BMW* and *State Farm* address the due process violation of excessive punitive damages through application of the Fourteenth Amendment, as both aforementioned cases originated as state actions, Paw Paw's maintains that both cases are equally applicable to this federal question case pursuant to the corresponding federal guarantee of due process under the Fifth Amendment. Paw Paw's asserts that the analysis of *BMW* and *State Farm* concerning Fourteenth Amendment due process guarantees must be applied in the instant case by way of the Fifth Amendment as explained in *Ogle v. Salamatof Native Ass'n, Inc.*:

> Read together, the Fifth and Fourteenth Amendments act similarly as limitations on respectively federal and state action. In the state context, the due process clause of the fourteenth amendment has been read to implicitly incorporate certain substantive rights which are expressed in the Bill of Rights. . . . Conversely, the Fifth Amendment has no express "equal protection clause" corresponding to the one found in the Fourteenth Amendment, but the Court has implied such a provision in the Fifth Amendment. Thus, Fifth Amendment "due process" and Fourteenth

> Amendment "due process" serve roughly the same purposes and should be given a consistent interpretation. In this decision, which deals with procedural due process, the Court will assume that the Supreme Court would reach the same results under the Fifth Amendment regarding federal action that it has reached under the Fourteenth Amendment regarding state action. . . . 906 F. Supp. 1321, 1327 FN4 (D. Alaska 1995). (Citations omitted)

Denial of writs in this case will allow a great miscarriage of justice by allowing to stand a verdict, that even if punitive damages are allowed, would be at a ratio of 80,000 to 1: which under this court's standards is a clear violation of due process.

Additionally, Paw Paw's respectfully challenges the additur made by the District Court Magistrate Judge, and upheld by the Fifth Circuit, whereby the jury compensatory damage award was increased to one dollar.

I. The Decision of the Fifth Circuit Court of Appeals is in direct conflict with the Supreme Court's binding decision in *BMW v. Gore*, as clarified by *State Farm Mutual Automobile Insurance Company v. Campbell*, and as previously followed by the Fifth Circuit in *Louisiana ACORN Fair Housing v. Le Blanc.*

A. The decision does not follow binding Supreme Court authority as set forth in *BMW v. Gore*, as clarified by *State Farm Mutual Automobile Ins. Co. v. Campbell.*

This Honorable Court has firmly established that an excessive and disproportionate punitive damage award

triggers due process analysis, as first set forth in *BMW* and subsequently expanded in *State Farm*. The excessiveness of a punitive award is unduly burdensome on the defendant, *BMW*, 116 S.Ct at 1598-99, and may also represent punishment in disproportion to actual damages. Such disproportionate awards are an arbitrary deprivation of property as punishment without establishment of actual wrongdoing justifying such deprivation. *State Farm* at 1520. Punitive damage "awards serve the same purpose as criminal penalties" and because "civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property" by juries with wide discretion and limited legal understanding. *State Farm* at 1520.

Discussing punitive damages in *BMW*, this Honorable Court reasoned that "such an award violates Due Process only when it can fairly be categorized as 'grossly excessive' . . . " *Id.* Paw Paw's respectfully contends that the punitive damage award in this case, an award with a ratio of 80,000 to 1, is "grossly excessive" and was rendered by the jury as punishment for alleged wrongdoings that were not related to any actual or potential harm suffered personally by the plaintiff.[1] It is Paw Paw's contention that in direct

[1] In pursuit of the aforementioned claims, Jimenez made the allegation that Paw Paw's also engaged in discriminatory policies and practices concerning other protected classes, specifically African-Americans. In that vein, Jimenez presented evidence concerning an African-American male, Jermaine Washington ("Washington"), who applied for employment at Paw Paw's Hammond, Louisiana store. Jimenez argued, in the face of evidence to the contrary, that Washington was not hired because Washington was African-American.

contradiction to the analysis presented in *State Farm* and *BMW*, Paw Paw's was punished for acts "which are independent from the acts upon which liability in the case are premised," and such unrelated allegations "may not serve as the basis for punitive damages and the defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm* at 1523. The punitive damage award returned against Paw Paw's was clearly grounded in the "decision maker's caprice," instead of being justifiably "based on an application of law." *State Farm* at 1520-21, quoting *Gore* at 587, 116 S.Ct. 1589.

In *BMW*, this Honorable Court found that a $2 million punitive damage award exceeded constitutional limitations because a ratio of 500 to 1 existed between the punitive damage award and the actual damage award. *BMW* at 1601. In support of that holding, the *BMW* opinion set forth three factors for consideration in determining the excessiveness of a punitive damage award: (1) the degree of reprehensibility of the conduct in question; (2) the degree of disparity between the actual harm and potential harm and the punitive damage award; and (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases. *BMW* at 1598-99. In the recent decision of *State Farm*, this Honorable Court again utilized those same three *BMW* factors to hold that "a punitive damages award of $145 million, where full compensatory damages are $1 million, is excessive and violates the Due Process Clause of the Fourteenth Amendment." *State Farm* at 1526.

Had the lower courts properly utilized the *BMW* factors the ultimate punitive damage award of $80,000.00 would have been found to be excessive and violative of due

process. Paw Paw's contends that the *BMW* factors were misinterpreted by Jimenez and misapplied by the presiding Judge and the Fifth Circuit Panel. Paw Paw's asserts that the opinion of *State Farm* provides important amplification of the *BMW* analysis which, when applied to the facts of this case, demands that this Writ of Certiorari be granted so that the lower court judgments may be vacated or a decision rendered which complies with this Honorable Court's clear and binding decisions in *BMW* and *State Farm*.

1. Defendant's conduct was not so reprehensible as to warrant punitive damages.

The first factor of the *BMW* analysis considers the degree of reprehensibility of the defendant's misconduct. *BMW* at 1598-99. In fact, the evaluation of this factor is the most "important indicium of a punitive damage award's reasonableness." *State Farm* at 1521. In evaluating a punitive damage award's reasonableness based on the degree of a defendant's reprehensibility, a court must consider whether:

> . . . the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm at 1521. It is essential that at least one of the above enumerated factors exist in favor of the party seeking an award of punitive damages, or the award will

be suspect. *Id.* Even so, the mere existence of only one of these factors by itself, ". . . may not be sufficient to sustain a punitive damages award . . ." *Id.* Paw Paw's contends that under the aforementioned reprehensibility analysis, Jimenez's hostile work environment claim does not rise to a level of reprehensibility that could justify any punitive damage award. It certainly does not justify an award so grossly disproportionate to the nominal damages awarded in post-trial motions by the presiding judge.

a. Jimenez suffered no physical or economic harm.

First, in analyzing the reprehensibility of Paw Paw's alleged conduct, Paw Paw's maintains that there was no actual harm to Jimenez, physical or economic, as shown through the jury award of no compensatory damages. Actual physical harm was never claimed by Jimenez and was certainly not proven at trial. The jury's refusal to award Jimenez any compensatory damages at all clearly shows that he personally suffered no harm. The first element in determining reprehensibility fails to substantiate any punitive award.

b. The health and safety of others was never at issue.

The second element of the reprehensibility analysis scrutinizes whether the conduct included an indifference to or a reckless disregard of the health or safety of others. Paw Paw's maintains that the conduct alleged in this case in no way displays any indifference to, or reckless disregard of, the health or safety of others. This is not a case

where a manufacturer deliberately subjected the consuming public to the risks of physical injury, as in *McClain v. Metabolife Intern., Inc.*, 2003 WL 1961344 (N.D.Ala. 2003). Clearly, there has been no such reckless disregard for the health or safety of others in the instant case. The second element in determining reprehensibility fails to support a punitive damage award.

c. The frequency of the acts was never proven.

The third element analyzes the reprehensibility of the actual conduct according to frequency of the offensive behavior. While the conduct at issue is alleged to have involved repeated actions over time, Paw Paw's contends that the frequency alleged still can not justify the incredible punitive damage award of $80,000.00, especially when the jury found no actual damages had been suffered by Jimenez.

Jimenez's witnesses testified to multiple instances of racial slurs, though the credibility of these witnesses was seriously questioned through cross-examination. Jimenez's witness and former Paw Paw's employee, John Wimbrow, testified that he heard racial slurs used against Jimenez. When asked directly, Wimbrow testified, "Matt, a couple of times, 'my little Mexican buddy,' stuff like that . . . the main one (perpetrator) was Chuck Markham, 'spicenstein,' 'Yo, spic,' 'Yo, beaner, what's going on?' "[2]

---

[2] It is likely that Wimbrow's vengeful motives were obvious to the jury, as he was terminated by Paw Paw's for inappropriate behavior. In contrast to Wimbrow's assertions, it was shown that Jimenez was a

(Continued on following page)

Leslie Hall testified that she did not believe the slurs were ever said to Jimenez's face. Tanya Strange testified that on one occasion Matt Margetta, then Paw Paw's General Manager, called and asked for Jimenez. At the time, Jimenez could not come to the telephone. Strange testified that Margetta said, "'Where's little Mexican running around,' or 'spic' running around." As a relevant point, Strange could not testify whether Margetta used the term "little Mexican" or "spic". Even assuming Strange's testimony was truthful, Jimenez did not witness or hear the alleged statement.

Floyd Feske, former Paw Paw's employee and long time Jimenez friend and drinking buddy, testified that he heard various terms, including "beaner", "spic", and "greaser"; however, Feske could not testify regarding the frequency of the slurs.

As seen solely from the testimony supporting Jimenez's claims (while ignoring the impeachment of each of Jimenez's witnesses, as well as the testimony offered by Paw Paw's that established that the slurs did not occur), the actual frequency of any discriminatory behavior was not established at trial. While some testimony was offered to support that slurs were made, most of which were not in Jimenez's presence, the frequency was not sufficient to

---

manager who could have dealt with such behavior from Mr. Markham, had it actually occurred. Additionally, there was no evidence that Jimenez reported or sought relief from any such behavior.

support an award of punitive damages and certainly not in a ratio of 80,000 to 1.[3]

d. There was no malice, trickery, or deceit.

Finally, in analyzing reprehensibility, Paw Paw's contends that any harm that potentially could have resulted from this situation was in no way the result of intentional malice, trickery, or deceit. Title VII and 42 U.S.C. § 1981a(b)(1) "provides that a plaintiff may recover punitive damages where the plaintiff demonstrates that the defendant engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357 (2nd Cir. N.Y. 2001). In order to prevail, a plaintiff must demonstrate that the defendant had the "requisite state of mind" of malice or reckless indifference. *Id.*, citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 539, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). It must be proven that the employer "at least discriminate[d] in the face of a perceived risk that its actions will violate federal law." *Kolstad*, 527 U.S. at 536, 119 S.Ct. 2118. Thus, in consideration of whether Paw Paw's possessed the requisite intent, analysis must be

---

[3] Paw Paw's maintains that the jury did not give weight to the following testimony, but instead awarded punitive damages (absent a compensatory award) based on prejudice against Paw Paw's that resulted from testimony regarding situations that did not affect Jimenez, such as the alleged treatment of Jermaine Washington and the alleged fraudulent warranty practices of Paw Paw's.

made of the employer's state of mind and whether his actions were intentionally in defiance of federal law.[4] *Id.*

At trial, Paw Paw's owner Dub Herring specifically denied even being aware of the alleged discriminatory conduct, as did Paw Paw's general manager, Matt Margetta. Margetta testified that he was also unaware that

---

[4] In this case, Jimenez failed to establish Paw Paw's requisite state of mind, specifically any actions in intentional defiance of federal law. In testimony, Paw Paw's part owner and President, W.B. Herring, Jr., testified that he did not and was not aware of any such racial slurs aimed against Jimenez. Mr. Herring testified the company maintained an anti-harassment policy. When asked whether he informed Jimenez that, as a policy, he did not hire "darkies", Mr. Herring responded, "That's a flat out lie." In direct contradiction, Mr. Herring testified that he did not discriminate against Jimenez and was not prejudiced against Hispanics. Furthermore, regarding Jimenez's brother David, also a Mexican-American, Mr. Herring testified, "David Jimenez was one of the first owners. In fact, the first person I ever took into my family to be a part of it was David Jimenez." Unfortunately, David was severely injured and later died as a result of a motorcycle accident. During the time David was hospitalized, Mr. Herring prayed with the family nightly and paid for their hotel room. After David died, Mr. Herring gave Jimenez thirty (30) days off with pay. Through testimony and example, Mr. Herring disproved any alleged intentional act.

Matt Margetta, then General Manager and part owner, testified that he never expressed racial slurs against Jimenez. In direct response, Mr. Margetta testified, "Never, never, have done that. I would never call my brother any names like that . . . " Under oath, at trial, Mr. Margetta testified to not knowing about the nuances of the law or about what forms of conduct are considered to be harassment in violation of federal anti-discrimination law. The two men had a long-standing working relationship and friendship. The two worked other jobs and socialized together. Mr. Margetta loved Jimenez and considered him a brother. In fact, during the trial, Mr. Margetta hugged Jimenez three times in the hallway. As the examples establish above, there was more than sufficient testimony which refuted that Paw Paw's intentionally racially discriminated against Jimenez or intentionally violated federal law.

the alleged conduct was punishable by law. Additionally, Paw Paw's maintains that despite the finding of a hostile work environment, any risk of a punitive damage award of such magnitude would never have been cognizable to Paw Paw's management or staff, as the punitive damage award leveled against Paw Paw's was not only excessive in comparison to the actual damage award, but was excessive in comparison to other Fifth Circuit awards for similar claims.

Furthermore, a finding of discrimination, or hostile work environment, does not stand as sufficient proof of malice or reckless indifference warranting punitive damages. *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 270 (5th Cir. 2000). "Nor is there a useful litmus for marking the point at which proof of violation sufficient to impose liability becomes sufficient to also support a finding of malice or reckless indifference." *Id.* The Fifth Circuit has previously held in *Farapella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996) that though a supervisor's wrongful behavior was found to be "severe and pervasive," for the purposes of establishing a hostile work environment claim, there was not sufficient "malice or reckless indifference" to support an award of punitive damages against the employer. 97 F.3d 803, 809 (5th Cir. 1996). The plaintiff in *Farapella-Crosby* was found to have "suffered emotional harm that manifested itself as humiliation and stress" at the hands of her supervisor, but was not awarded punitive damages because the Court refused to conclude that the company itself acted with "malice or reckless indifference." *Id.* In the case at bar, there was no finding of malice or reckless indifference. The punitive damage award should not have been upheld.

It is clear that the factors used to determine reprehensibility are not present in this case so as to justify an award of punitive damages. Of the four factors to be considered, only the third, the actual acts themselves, has any support at all. Even then, Jimenez failed to establish the frequency of the alleged acts at trial. The first factor in the *BMW* analysis fails to support an award of punitive damages.

2. The punitive damage award was grossly disproportionate to the actual or potential harm.

The second factor of the three part *BMW* test for determining the excessiveness of a punitive damage award is the degree of disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award. *BMW* at 1598-99. Paw Paw's respectfully asserts that the award of $80,000.00 in punitive damages to one dollar in actual damages, an astronomical 80,000 to 1 ratio, represents a clear departure from binding case law, which rejects excessive, disproportionate punitive damage awards in Title VII actions as contrary to congressional intent and public policy. *Hennessey v. Penril Datacom Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995). In the two controlling cases on this matter, *BMW* and *State Farm*, this Honorable Court has rejected awards in which the ratios of disparity were 500 to 1 and 145 to 1, respectively. *State Farm* at 1589.

In *BMW*, this Honorable Court declared that "a ratio as breath-taking as 500 to 1" is "clearly outside the acceptable range." *BMW*, 116 S.Ct at 1602. This Honorable Court has also recognized the punitive damage award of four times the amount of the compensatory damage award

to be "close to the line in terms of constitutional propriety." *Id.* The recent decision in *State Farm* expounded on the opinion of *BMW* by explaining that while the Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award, "our jurisprudence and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm* at 1589. Stating further that "single-digit multipliers are more likely to comport with due process, while still achieving the State's deterrence and retribution goals, than are awards with ratios in range of 500 to 1, or in this case, of 145 to 1." *State Farm* at 1524.

The astonishing award ratio of 80,000 to 1 in this case is fundamentally unfair and unconstitutionally excessive under the decision this Honorable Court rendered in *BMW*, and later solidified through the opinion of *State Farm*, and must be overturned.

3. The punitive damage award was excessive in light of awards in comparable cases.

The third and final factor of the *BMW* test for determining the excessiveness of a punitive damage award is to analyze the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Originally, the jury award in this case was no compensatory damages and $161,000.00 in punitive damages. After post-trial motions, judgment was entered for one dollar in nominal damages and punitive damages of $80,000.00. Magistrate Judge Wilkinson

admitted that even after the remittitur to $80,000.00, Jimenez received the highest punitive damage award on an employment discrimination claim in Fifth Circuit history. As such, Paw Paw's asserts that the punitive award is fundamentally unfair and in violation of due process as an arbitrary deprivation of property as there was no way to expect that an employee could be found to have suffered no, or nominal, actual damages, but still be entitled to punitive damages in excess of any other comparable Fifth Circuit decision.

It has also been established that punitive damage awards should be rendered according to scale, with the most egregious conduct receiving the most severe penalty assessment, in keeping with the congressional mandate concerning assessment based on considerations of company size. *Hennessey*, 69 F.3d at 1355-56. Comparing the case law on point, where no punitive damages or more minimal awards have been given for more or equally egregious allegations of discriminatory conduct than were asserted here, the award in this case is excessive. Magistrate Judge Wilkinson reportedly based the $80,000.00 figure on the punitive damage award rendered in *Deffenbaugh-Williams v. Wal-Mart*, 156 F.3d 581, 587 (5th Cir. 1998). *Deffenbaugh-Williams v. Wal-Mart* is a Fifth Circuit case in which the plaintiff made claims of racial discrimination under Title VII and 42 U.S.C. § 1981. *Id.* at 581. However, *Deffenbaugh-Williams*, unlike the decision at hand, follows the BMW analysis and recognizes concepts of proportionality. *Id.* at 592-95. The $75,000.00 punitive damage award in *Deffenbaugh-Williams* was adjusted from $100,000.00, and accompanied by a compensatory award of $19,000.00, at a ratio of approximately 4 to 1. *Id.* Further, the punitive damages allocated in

Deffenbaugh-Williams were leveled against the defendant/employer, Wal-Mart, a corporation, which is undeniably larger and has greater resources than Paw Paw's. *Id.*

Considering the aforementioned facts, and because "elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose" Paw Paw's has been unfairly prejudiced. *BMW* at 1598-1599. In light of Paw Paw's size, and the relevant case law, a punitive damage judgment of such magnitude as $80,000.00 could not have been reasonably contemplated by Paw Paw's.

In this case, the Court should have utilized the aforementioned *BMW* guideposts to determine that, even after remittitur, the punitive damage award was excessive and, thus, an overly burdensome Due Process violation. Paw Paw's respectfully submits that by failing to find the $80,000.00 punitive damage award excessive and disproportionate, the District Court and the Fifth Circuit panel ruled in contradiction to the binding *BMW* decision.

B. The Panel's Decision Is Contrary to the Fifth Circuit's Decision in Louisiana ACORN.

Additionally, Paw Paw's contends that through their decision in this matter, the Fifth Circuit panel created a split of authority within the circuit regarding whether a punitive damage award should be allowed to stand when the jury awarded neither compensatory nor nominal damages. The Fifth Circuit's decision in *Louisiana ACORN Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000)

held that the punitive damage award could stand absent an award of actual damages only in instances of constitutional violations. *Id.* at 303.

The Fifth Circuit has previously held that punitive damages awards are allowable in the absence of actual damages only in cases where constitutional rights have been violated. *Louisiana ACORN*. In *Louisiana ACORN*, it was found that the defendant did violate the plaintiff's rights under the Fair Housing Act, but did not violate the plaintiff's constitutional rights and for that reason, the Court vacated the punitive damage award levied against the defendant. While *Louisiana ACORN* specifically addresses the damage issue in reference to the Fair Housing Act, the opinion is predicated on cases involving many different discrimination statutes, including 42 U.S.C. § 1981 and Title VII. *Id.*

In the case at bar, there has been no finding that Jimenez's constitutional rights have been violated and as such, the punitive damage award, in absence of a compensatory damage award by the jury, must be vacated in accordance with the opinion of *Louisiana ACORN*.

II. As the questions of due process, proportionality and the relationship between compensatory and punitive damages is currently an area of inter-circuit conflict, the Fifth Circuit's Decision in this case increases confusion and conflict among the circuits instead of creating uniformity.

This writ should be granted to clarify an inter-circuit conflict by applying *BMW* and *State Farm* to Title VII cases to ensure that disproportionate punitive damage

awards do not stand despite a finding of no actual, or of only nominal damages. Paw Paw's contends that this important issue of contention must be resolved in favor of proportionality, reasonableness and due process by applying the *BMW* analysis, as further explained in *State Farm*, to Title VII cases. Some circuits, such as the Fifth (in the instant case) and the Second (See: *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352 (2nd Cir. 2001)), allow extensive punitive damage awards without actual damage awards of greater than nominal amounts. These decisions of the Second and Fifth Circuits allow a vast differential between punitive and actual damages, disregarding this Honorable Court's decisions in *BMW* and *State Farm*. However, courts in other circuits are utilizing the decisions of *BMW* and *State Farm* to enforce the principle that punitive damage awards must reasonably relate to an actual damage award, even in Title VII cases. See: *Baker v. John Morrell and Co.*, 2003 WL 21355198 (N.D. Iowa 2003), and *Parrish v. Sollecito*, 2003 WL 1905613 (S.D.N.Y. 2003). Paw Paw's contends that it is critical that plaintiffs prove, and win, actual damages in order for the punishment of the defendant to be justified, and in cases, such as this, the application of *BMW* and *State Farm* would ensure that an arbitrary deprivation of the defendant's property would not occur despite a finding of no actual harm to the plaintiff.

This conflict in interpretation of Title VII exists due to Congress' failure to explicitly require that workplace discrimination plaintiffs be awarded actual damages before receiving punitive damage awards when Title VII was amended through the enactment of § 1981a in 1991. Stacey A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring Juries?*,

54 Mercer Law Review 1081 (Spring 2003). As the result, some trial courts permit "juries to award punitive damages in Title VII cases when neither compensatory nor nominal damages have been found," while other courts have filled the statutory gap by utilizing the common law principle that "without a finding of actual damages, there effectively exists no cause of action to support a punitive damage award." *Id.* The rationale behind the common law principle has been that a "plaintiff who is unable to show damages worthy of compensation is seen by the common law as undeserving of the potential windfall provided by punitive damages." *Id.*

In deciding the instant case, the Fifth Circuit has interpreted Title VII to disregard the aforementioned common law rule, and instead uses Title VII as a means to allow plaintiffs to collect unreasonable punitive damage awards without showing any actual damage. Courts, such as the Fifth Circuit, "that have circumvented this link (between punitive and actual damages) by requiring only a Title VII violation, but not compensatory or even nominal damages before an award of punitive damages, run the risk of converting civil actions into quasi-criminal proceedings, raising concerns of fundamental fairness and constitutional due process." *Id.* However, this risk will be avoided by applying the decisions of *BMW* and *State Farm* to Title VII cases.

The confusion as to the treatment of Title VII cases is not surprising as other cases, not coming under the purview of Title VII, have not been decided with any inter-circuit uniformity, either. For instance, the Seventh Circuit in *Timm v. Progressive Steel Plating Inc.*, 137 F.3d 1008 (7th Cir. 1998) held in favor of punitive awards absent actual or nominal awards. The First Circuit in

Kerr-Selgas v. American Airlines Inc., 69 F.3d 1205 (1st Cir. 1995), held that punitive damages are not allowable absent proof of actual damages. While the Eleventh Circuit has held that punitive damages are recoverable where liability has been established and justification is shown for a punitive award, even in the absence of an award of actual or nominal damages, *Ad-Vantage Telephone Directory Consultants Inc. v. GTE Directories Corp.*, 943 F.2d 1511 (11th Cir. 1991).

Paw Paw's contends that this aforementioned inter-circuit conflict occurs in Title VII cases, as well as many other types of cases. Paw Paw's urges this Honorable Court, in the interests of clarity, equity and uniformity to require the application of *BMW* and *State Farm*, to all cases including Title VII actions, as a means of ensuring that punitive damages are not awarded in excessive disproportion to the actual damages proven by the plaintiff.

CONCLUSION

For the foregoing reasons, Paw Paw's respectfully submits that the decision of the Fifth Circuit Court of Appeals was in error and is in contravention to established precedent of the United States Supreme Court and the Fifth Circuit. Petitioners respectfully request that Certiorari be granted and, upon consideration of the issues and the arguments raised herein, that the nominal and

punitive damage awards, as well as the award of attorney's fees and costs, against Paw Paw's be vacated.

Respectfully submitted,

LARRY G. CANADA
GALLOWAY, JOHNSON, TOMPKINS,
BURR & SMITH
701 Poydras St., Suite 4040
New Orleans, Louisiana 70139
Attorney for Petitioner,
Paw Paw's Camper City, Inc.

TABLE OF APPENDICES

Page

A – Decision of the United States Court of Appeals for the Fifth Circuit Affirming Trial Court Decision Dated March 17, 2003 ..... 1a

B – Order and Reasons of the United States District Court for the Eastern District of Louisiana District Dated and Filed February 22, 2002 ..... 3a

C – Amended Judgment of the United States District Court for the Eastern District of Louisiana Dated and Filed February 25, 2002 ..... 61a

D – Judgment of the United States District Court for the Eastern District of Louisiana Dated and Filed November 21, 2001 ..... 63a

E – Denial Of Petition for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit Dated and Filed April 17, 2003 ..... 64a

F – 28 U.S.C. § 1251(1) 66a

G – 28 U.S.C. § 1291 ..... 67a

H – 28 U.S.C. § 1294 ..... 68a

I – 28 U.S.C. § 1331 ..... 69a

J – 42 U.S.C. § 1981 ..... 70a

K – 42 U.S.C. § 2000(e) *et seq* 71a

L – United States Supreme Court Rule 10(a) 87a

M – United States Supreme Court Rule 13 ..... 89a

N – Fifth Circuit Local Rule 35 ..... 91a

O – Fed R. App. P. 3 (2002) 93a

P – Fed. R. App. P. 4(a) (2002) 96a

TABLE OF APPENDICES – Continued

Page

Q – Fed. R. Civ. P. 50(b) (2002) 100a

R – Fed. R. Civ. P. 59 (2002) 102a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30291

JAMES V. JIMENEZ,

Plaintiff-Appellee-Cross-Appellant,

v.

PAW PAW'S CAMPER CITY, INC.,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
00-CV-1756-N

(Filed Mar. 17, 2003)

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL*, District Judge.

PER CURIAM:**

After carefully reviewing the record and considering the briefs of the parties and the argument of counsel, we

---

* District Judge of the Southern District of Texas, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

are satisfied that the district court committed no reversible error in this fact intensive case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES V. JIMENEZ	CIVIL ACTION
VERSUS	NO. 00-1756
PAW-PAW'S CAMPER CITY, INC.	SECTION "N" (2)

ORDER AND REASONS

(Filed Feb. 22, 2002)

This is an employment discrimination case tried before me with the consent of the parties pursuant to 28 U.S.C. § 636(c). At the end of four trial days, the jury returned a verdict that found liability on a single claim and awarded punitive damages, but *no* compensatory damages, in favor of plaintiff, James V. Jimenez, and against defendant, Paw-Paw's Camper City, Inc. Jury Verdict Form, Record Doc. No. 156. The court subsequently entered judgment on the verdict. Record Doc. No. 158.

Both parties filed timely post-trial motions. Jimenez filed a motion for post-judgment relief pursuant to Fed. R. Civ. P. 59(e), seeking an award of compensatory damages, an award of nominal damages and injunctive relief. Alternatively, he requests a new trial on compensatory damages only, or in the further alternative, a new trial on all issues if the court grants Paw-Paw's Rule 50 motion. Record Doc. No. 159. Although Paw-Paw's filed its opposition memorandum two days late, Record Doc. No. 164, without seeking leave for the late filing, Local Rule 7.5E, the court has considered it. Plaintiff received leave to file a reply memorandum. Record Doc. Nos. 166, 167.

Paw-Paw's filed a post-trial motion for judgment as a matter of law; or in the alternative, a motion for new trial; or in the further alternative, a motion for remittitur. Record Doc. No. 160. Jimenez filed a timely opposition memorandum. Record Doc. No. 163.

In addition, Jimenez filed a motion for attorney's fees and costs, supported by several affidavits and time sheets. Record Doc. No. 162. Paw-Paw's filed a timely opposition memorandum. Record Doc. No. 165. The court ordered plaintiff to file a supplemental memorandum and any additional evidence to support his motion, Record Doc. No. 168, and plaintiff did so. Record Doc. No. 169.

Having considered the complaint, as amended, the record, the submissions of the parties and the applicable law, and for the following reasons, **IT IS ORDERED** that plaintiff's motion for post-judgment relief is GRANTED IN PART to award nominal damages of $1.00. The remainder of plaintiff's motion is DENIED.

IT IS FURTHER ORDERED that defendant's motion for judgment as a matter of law; or in the alternative, motion for new trial; or in the further alternative, motion for remittitur is GRANTED IN PART to order a remittitur in the punitive damages award or, if plaintiff refuses to accept a remittitur, a new trial on punitive damages only. The remainder of the motion is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for attorney's fees and costs is GRANTED IN PART AND DENIED IN PART, as set out below.

I. PROCEDURAL BACKGROUND

Jimenez sued his former employer, Paw-Paw's, pursuant to Title VII and 42 U.S.C. § 1981. He claimed that Paw-Paw's demoted him, paid him less, subjected him to a hostile work environment and constructively discharged him based on his Mexican national origin and Hispanic race. Complaint, Record Doc. No. 1; First Amended Complaint, Record Doc. No. 65.

At trial, Paw-Paw's moved at the close of plaintiff's case-in-chief and again at the close of all the evidence for judgment as a matter of law. The court denied the motions and the case was submitted to the jury. In response to special interrogatories, the jury found that Paw-Paw's had subjected Jimenez to a hostile work environment, but had neither constructively discharged him nor discriminated against him by paying him less or demoting him on the basis of his race or national origin. The jury awarded plaintiff *no* compensatory damages. However, the jury also found that Paw-Paw's had acted with malice or reckless indifference to Jimenez's federally protected rights in subjecting him to a hostile work environment, and it awarded plaintiff $161,000 in punitive damages. Jury Verdict Form, Record Doc. No. 156.

II. ANALYSIS

A. Standard of Review Under Fed. R. Civ. P. 50

Paw-Paw's has renewed its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50.

> [Judgment as a matter of law] is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on

> that issue." There is no legally sufficient evidentiary basis when "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." We are to review the record as a whole, drawing all reasonable inferences in favor of the nonmoving party and without making credibility determinations or weighing the evidence. We also "give credence to . . . that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Finally, there must be more than a mere scintilla of evidence in the record to render the grant of [judgment as a matter of law] inappropriate.

Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 218 (5th Cir. 2001) (quoting Fed. R. Civ. P. 50(a); *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir. 2000); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 151 (2000)) (citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251 (1986); *Krystek v. University of So. Miss.*, 164 F.3d 251, 255 (5th Cir. 1999)) (additional internal quotations omitted).

B. Standard of Review Under Fed. R. Civ. P. 59

Jimenez has moved to alter or amend the judgment under Rule 59(e) to award him compensatory or, alternatively, nominal damages. Rule 59 does not specify the permissible grounds for granting a motion to amend or alter the judgment, but the Fifth Circuit has held that the decision on such a motion is within the district court's discretion and that the decision and decisionmaking process need only be reasonable. *St. Paul Mercury Ins. Co.*

v. Fair Grounds Corp., 123 F.3d 336, 339 (5th Cir. 1997); *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994) (citation omitted).

Federal district courts in Louisiana have formulated the following standards for considering Rule 59(e) motions.

> Altering, amending, or reconsidering a judgment is an extraordinary measure, which courts should use sparingly. The remedy is so extraordinary that the Fifth Circuit has directed that the Rule 59(e) standard "favors denial of motions to alter or amend a judgment." . . . .
>
> Generally, the grounds for granting a request to alter or amend a judgment under Rule 59(e) of the FRCP are as follows: (1) to correct manifest errors of law or fact upon which judgment is based; (2) the availability of new evidence; (3) the need to prevent manifest injustice; or (4) an intervening change in controlling law. A Rule 59(e) motion should not be used to relitigate prior matters that should have been urged earlier or that simply have been resolved to the movant's dissatisfaction.

In re Self, No. 01-0758, 2001 WL 1456386, at *2 (W.D. La. Oct. 10, 2001) (Little, C.J.) (citing 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2810.1, at 124-27 (hereinafter "Wright & Miller"); *Fields v. Pool Offshore, Inc.*, No. 97-3170, 1998 WL 43217, at *2 (E.D. La. Feb. 3, 1998) (Clement, J.), *aff'd*, 182 F.3d 353 (5th Cir. 1999); *Motiva Enters. LLC v. Wegmann*, No. 00-3096, 2001 WL 246414, at *2 (E.D. La. Mar. 12, 2001) (Vance, J.); *Clay v. Daichi Shipping*, No. 97-3630, 2000 WL 6269, at *1 (E.D. La. Jan. 5, 2000) (Fallon,

J.)) (quoting *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993)); *accord In re Babcock & Wilcox Co.*, No. 00-558, 2001 WL 1204074, at *1 (E.D. La. Oct. 11, 2001) (Vance, J.).

Both plaintiff and defendant request a new trial under Rule 59(a) in the alternative. Paw-Paw's moves for a new trial on grounds that the evidence was insufficient to support the jury's verdict. Plaintiff requests a new trial if the court grants defendant's motion for judgment as a matter of law.

Under Rule 59(a), "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). Rule 59 does not specify the permissible grounds for a motion for new trial, but it is clear that "[n]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great weight of the evidence." *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992); *accord Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998); *Carter v. Fenner*, 136 F.3d 1000, 1010 (5th Cir. 1998). When considering new trial motions, the court may set aside the verdict even if there is substantial evidence to support it. Moreover, the court "is not required to take that view of the evidence most favorable to the verdict-winner" and "is free to weigh the evidence." Wright & Miller, *Federal Practice and Procedure* § 2806, at 65-66 (1995); *accord Whitehead*, 163 F.3d at 270 n.2. "The district court abuses its discretion by denying a new trial only when there is an absolute absence of evidence to support the jury's verdict." *Seidman v. American Airlines,*

Inc., 923 F.2d 1134, 1140 (5th Cir. 1991) (quotation omitted); *accord Whitehead*, 163 F.3d at 269.

In the context of reviewing an award of punitive damages, the court must bear in mind that the Due Process Clause of "the Constitution imposes a substantive limit on the size of punitive damages awards." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). "Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses . . . ." *Id.* at 432. Judicial review of the amount awarded provides a procedural safeguard against that danger. *Id.*

C. Plaintiff's Motion for Post-Judgment Relief

1. *Plaintiff's Request for Additur*

Jimenez argues that the court should amend the judgment by additur to award him compensatory damages and lost earnings. He points out that the jury answered "yes" to Jury Interrogatory No. 1, which asked, "Do you find by a preponderance of the evidence that defendant, Paw-Paw's Camper City, Inc., subjected plaintiff, James V. Jimenez, to a racially hostile work environment *and that such discrimination was a proximate cause of damage to Jimenez*?" Record Doc. No. 156 (emphasis by plaintiff). Therefore, Jimenez argues, the jury should have awarded him compensation for the damage it found.

"[A]n additur grant is an inherent recognition that a verdict contravenes the clear weight of the evidence . . . ." *Clay v. Gordon*, 205 F.3d 1339, 2000 WL 191936, at *2 (6th

Cir. 2000) (citation omitted). "It has been settled since the Supreme Court's decision in *Dimick v. Schiedt* that the Seventh Amendment generally proscribes additur after federal jury trials." *Id.* at *3 (citing *Dimick v. Schiedt,* 293 U.S. 474, 486-87 (1935); *Jones v. Wal-Mart Stores, Inc.,* 870 F.2d 982, 985 (5th Cir. 1989)) (additional citations omitted); *accord Taylor v. Green,* 868 F.2d 162, 164 (5th Cir. 1989). There is a narrow exception to the *Dimick* rule for undisputed, "definite and incontrovertible" damages only. *Clay,* 2000 WL 191936, at *3 (citing *Liriano v. Hobart Corp.,* 170 F.3d 264, 272-73 (2d Cir. 1999); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.,* 117 F.3d 1244, 1252 (11th Cir. 1997); *Jones,* 870 F.2d at 985).

No such definite and incontrovertible damages are at issue in Jimenez's request for additur. Additur is not available to cure an inadequate verdict. *Green v. Administrators of Tulane Educ. Fund,* No. 97-1869, 2000 WL 341027, at *3 (E.D. La. Mar. 30, 2000) (Duval, J.) (citing *Jones,* 870 F.2d at 985); *Chaney v. New Orleans Publ. Facility Mgmt., Inc.,* No. 96-4023, 1998 WL 30725, at *4 (E.D. La. Jan. 23, 1998) (Clement, J.) (citing *Jones,* 870 F.2d at 985).

Jimenez argues there was sufficient evidence for the jury to find that he suffered a loss of earnings as a result of being demoted and being paid less than his white peers. However, the jury clearly rejected that theory of liability when it answered "no" to Jury Interrogatory No. 3, which asked, "Do you find by a preponderance of the evidence that Paw-Paw's discriminated against Jimenez by demoting him or paying him less based on his race or national origin and that such discrimination was a proximate cause of damage to Jimenez?," and refused to award such damages when it left blank the line in Jury Interrogatory No. 4

marked "Lost Earnings." The record contains a legally sufficient evidentiary basis on which the jury concluded that plaintiff failed to prove lost earnings as a result of a hostile work environment, which is the only claim on which he prevailed, as opposed to lost earnings as a result of poor job performance or other non-job related reasons noted below about which there was ample evidence at trial. Accordingly, his motion to recover lost earnings is denied.

Further, to the extent plaintiff requests additur for emotional distress or similar general damages, the jury rejected any such award when it left blank the line in Jury Interrogatory No. 4 marked "Past and Future Mental Anguish, Mental Pain and Suffering, and Loss of Capacity for Enjoyment of Life." The jury's conclusion was based on legally sufficient evidence and was not against the great weight of the evidence. There was ample evidence from which the jury could have concluded that plaintiff's emotional problems were attributable to factors other than his employment environment, including the breakup of his marriage, the death of his brother, his own drinking and a personality disorder about which defendant's psychiatric expert testified. Thus, there was legally sufficient evidence, including but not limited to plaintiff's own testimony, from which the jury could easily have concluded that plaintiff's emotional distress was caused by other stressors in his life, rather than by the hostile environment he experienced at work.

Jimenez has not established any of the factors used by courts to grant a Rule 59(e) motion. Because such a motion should not be used to relitigate prior matters that simply have been resolved to the movant's dissatisfaction, this portion of plaintiff's motion for additur is denied.

2. *Plaintiff's Request for Nominal Damages*

Although the jury found that Paw-Paw's created a hostile work environment that violated Jimenez's rights to be free from discrimination under Title VII and/or Section 1981,[1] the jury awarded *no* compensatory damages. Plaintiff requests an award of nominal damages on this claim.

Racial discrimination is a "fundamental injury to the individual rights of a person." *Goodman v. Lukens Steel,* 482 U.S. 656, 661 (1987). As the Supreme Court has stated in a case brought under 42 U.S.C. § 1983:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266 (1978). "[N]ominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable

---

[1] The court instructed the jury that the standards for finding racial discrimination are the same under Title VII and Section 1981. Jury Instructions, Record Doc. No. 155; *see Walker v. Thompson,* 214 F.3d 615, 625 (5th Cir. 2000). Therefore, the court did not ask the jury to differentiate in its verdict between the two legal theories.

injury." *Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299, 308 n.11 (1986) (citing *Carey,* 435 U.S. at 266). "*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his [constitutional] right . . . but cannot prove actual injury." *Farrar v. Hobby,* 506 U.S. 103, 112 (1992) (citing *Carey,* 435 U.S. at 266).

Thus, the Fifth Circuit has held that a plaintiff who proves a violation either of his constitutional rights under Section 1981 or of his statutory rights under Title VII, but no actual injury, is entitled to recover at least nominal damages. *Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927, 940, 941 (5th Cir. 1996) (Section 1981 and Title VII) (citing *Carey,* 435 U.S. at 264); *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir. 1977) (Section 1981). Other courts have reached similar conclusions under both Title VII and Section 1983, which is similar to Section 1981 in that it provides a statutory remedy for violation of a constitutional right. *See Bailey v. Runyon,* 220 F.3d 879, 880 (8th Cir. 2000) (nominal damages under Title VII); *Searles v. Van Bebber,* 251 F.3d 869, 879 (10th Cir. 2001) (nominal damages are mandatory under Section 1983 for violation of constitutional rights); *Louisiana ACORN Fair Housing v. LeBlanc,* 211 F.3d 298, 302 (5th Cir. 2000) (in the Fifth Circuit, a Section 1983 plaintiff who proves a constitutional violation is entitled to nominal damages in the absence of actual injury); *Alexander v. Riga,* 208 F.3d 419, 429 (3d Cir. 2000) (citing *Carey,* 435 U.S. at 266-67) (plaintiff is entitled to nominal damages for constitutional violation without actual injury); *but see Walker v. Anderson Elec. Connectors,* 944 F.2d 841, 844 (11th Cir. 1991) (*Carey* does not compel an award of nominal damages for "a violation of purely statutory rights under Title VII").

In the instant case, Jimenez brought claims under both Section 1981 and Title VII, and his proof of each claim was identical. The Fifth Circuit in *Patterson* instructed the district court, which had conducted a bench trial, to award nominal damages under both statutes on remand. *Patterson,* 90 F.3d at 940, 941.

At the instant trial, neither party requested, nor did the court give, a jury instruction that the jury must award nominal damages if it found liability but no actual injury.

> An appropriate remedy for that error, however, is for the court itself to enter judgment awarding the claimant nominal damages. Although the Seventh Amendment generally prohibits a court from augmenting a jury's award of damages, that proscription is not violated by the court's entering judgment awarding nominal damages when the jury has failed or refused to do so and the claimant is entitled to such damages as a matter of law.

Robinson v. Cattaraugus County, 147 F.3d 153, 162 (2d Cir. 1998) (citations omitted); *accord Bailey,* 220 F.3d at 880; *Hicks v. Brown Group, Inc.,* 902 F.2d 630, 634 (8th Cir. 1990), *vacated on other grounds,* 499 U.S. 914 (1991); *Beckford v. Irvin,* 49 F.Supp.2d 170, 182 (W.D.N.Y. 1999); *see also Fyfe v. Curlee,* 902 F.2d 401, 406 (5th Cir. 1990) (Section 1983 plaintiff at minimum was entitled to nominal damages because her constitutional rights were violated; after new trial on damages and other remedies, district court on remand must enter judgment for at least nominal damages of $1); *but see Kerr-Selgas v. American Airlines, Inc.,* 69 F.3d 1205, 1215 (1st Cir. 1995) (compensatory damages award on plaintiff's Title VII claim was reduced to zero by court's post-verdict allocation of entire

compensatory damages award to state law claim to avoid Title VII damages cap; liability verdict did not compel award of nominal damages on Title VII claim in absence of timely request either for jury charge on nominal damages or for additur to compensatory damages verdict on Title VII claim). In the instant case, unlike in *Kerr-Selgas,* plaintiff timely moved for an additur of nominal damages.

Accordingly, the court will amend the judgment to correct a manifest error of law by adding $1.00 in nominal damages.

3. *Plaintiff's Request for Equitable Relief*

Jimenez also moves for injunctive and declaratory relief under Title VII based on the prayer in his original complaint for "all further relief as this Honorable Court deems proper." Record Doc. No. 1. "It is a well-settled rule that a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial." *McGehee v. Certainteed Corp.,* 101 F.3d 1078, 1080 (5th Cir. 1996); *see* Fed. R. Civ. P. 16(e) (pre-trial order "shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice.").

Plaintiff did not raise any claim for injunctive or declaratory relief in the pretrial order. To the extent his current motion could be construed as a request to modify the pretrial order, it is denied. *Walker,* 944 F.2d at 844.

A declaratory judgment that Paw-Paw's created a hostile environment while Jimenez worked there would accomplish nothing that the jury's verdict has not already

done. Further, because plaintiff left Paw-Paw's employ long ago, injunctive relief would not be appropriate regarding defendant's future conduct and would only prejudice defendant at this late date. "It would be unfair to [Paw-Paw's] to give [Jimenez] relief which [he] did not request; relief for which [Paw-Paw's] was never permitted to establish a defense." *Id.* Accordingly, this portion of plaintiff's motion is denied.

D. Defendant's Motion for Judgment as a Matter of Law; in the Alternative, Motion for New Trial; in the Further Alternative, Motion for Remittitur

1. *The Jury's Liability Verdict Is Supported by the Evidence*

Paw-Paw's memorandum in support of its motion to overturn the liability verdict proceeds from the mistaken belief that the jury found Paw-Paw's had unlawfully discriminated against Jimenez in his pay and demotions but had not subjected him to a hostile work environment. The jury verdict form is clear that the jury actually found the opposite on these two claims. Thus, defendant argues that it proved its legitimate business reasons for its employment decisions regarding plaintiff and that he failed to show that its decisions were pretextual. Because Paw-Paw's prevailed on Jimenez's discriminatory pay and demotion claim, it is unnecessary to address that argument.

Assuming that defendant intended to request judgment as a matter of law on the jury's finding of liability for a hostile work environment, its motion is denied. The record as a whole contains a legally sufficient evidentiary

basis for a reasonable jury to find against Paw-Paw's on this claim. Several witnesses, including Jimenez, testified that he was the target of repeated, ethnically offensive slurs by Paw-Paw's managers and employees that occurred frequently and continued over an extensive period of time, and that the company did nothing to correct the hostile situation. Although Paw-Paw's witnesses denied this conduct, the jury was entitled to weigh the credibility of each witness and to disbelieve defendant's witnesses. The evidence was sufficient for a reasonable jury to find that this conduct was more than simple teasing, offhand comments and isolated incidents, and that it affected a term, condition or privilege of plaintiff's employment; in other words, that it was sufficiently severe or pervasive that a reasonable person in his position would find his work environment to be hostile. *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998); *Mota v. University of Tex.,* 261 F.3d 512, 524 (5th Cir. 2001); *Celestine v. Petroleos de Venezuella SA,* 266 F.3d 343, 353 (5th Cir. 2001); *McConathy v. Dr. Pepper/Seven Up Corp.,* 131 F.3d 558, 563 (5th Cir. 1998); *DeAngelis v. El Paso Mun. Police Officers Ass'n,* 51 F.3d 591, 593 (5th Cir. 1995); *Veal v. AT & T Corp.,* No. 99-370, 2000 WL 303299, at *7 (E.D. La. Mar. 22, 2000) (Duval, J.).

For the same reasons, the jury's liability verdict is not against the great weight of the evidence and defendant is not entitled to a new trial on liability.

2. *The Special Verdict Answers Are Both Consistent and Supported by the Evidence*

Paw-Paw's argues that the jury's special verdict answers are inconsistent and that the verdict must be set aside because the jury found liability on one of plaintiff's

claims (although defendant argues the wrong one) but not the other two, and because it awarded punitive damages without awarding any compensatory damages. The court is "'required under the Seventh Amendment to make a concerted effort to reconcile apparent inconsistencies in answers to special verdicts if at all possible.'" *Ellis v. Weasler Eng'g Inc.*, 258 F.3d 326, 343 (5th Cir. 2001) (quoting *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962)).

> In reviewing jury answers to special verdicts, we . . . must ask whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict. *Only if there is no view of the case that will make the jury's answers consistent may we set aside its decision.*
>
> In considering whether the seemingly inconsistent verdicts may be reconciled, the court must view the evidence in the light most favorable to upholding the jury's decision by a finding of consistency. Additionally, the special verdicts must be construed in light of the surrounding circumstances of the case.

Id. (quotations and citations omitted) (emphasis added).

In this case, the jury's verdict is not inconsistent. The jury was attentive throughout the trial. Its responses to the jury interrogatories are logical and indicate that it followed the court's instructions. The jury could reasonably and consistently find, based on the evidence and the differing standards of proof for each legal claim, that

Jimenez proved his hostile environment claim yet failed to prove either his constructive discharge or discriminatory pay and demotions claims.

As noted above, to prove his hostile environment claim, plaintiff only had to prove that the racially offensive conduct affected a term, condition or privilege of his employment; in other words, that it was sufficiently severe or pervasive that a reasonable person in his position would find his work environment to be hostile. *Celestine,* 266 F.3d at 353; *see Huckabay v. Moore,* 142 F.3d 233, 239 (5th Cir. 1998) ("The ongoing racial harassment suffered by Huckabay was all of the same sort, it was continual, and it was a permanent condition of his workplace." Plaintiff stated that he was "constantly ribbed and harassed" by and endured "constant remarks" from his coworkers.). To recover on his legally distinct claim of constructive discharge, however, plaintiff had to prove that Paw-Paw's intentionally made his working conditions so intolerable that a reasonable person would feel compelled to resign. *Hunt v. Rapides Healthcare Sys.,* No. 00-31260, 2001 WL 1650961, at *12 (5th Cir. Dec. 26, 2001). Significantly, a constructive discharge claim requires plaintiff to prove a "greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment claim." *Benningfield v. City of Houston,* 157 F.3d 369, 378 (5th Cir. 1998). Thus, the jury reasonably and consistently could have found that plaintiff's work environment was hostile to plaintiff's Hispanic national origin but not so intolerable that a reasonable person would have felt compelled to resign. *See Landgraf v. USI Film Prods.,* 968 F.2d 427, 429, 430 (5th Cir. 1992), *aff'd,* 511 U.S. 244 (1994) (Plaintiff suffered sexual harassment "sufficiently severe to support a hostile work environment claim," but

"not severe enough that a reasonable person would have felt compelled to resign . . . . The harassment here, while substantial, did not rise to the level of severity necessary for constructive discharge." There also was evidence of another plausible reason, other than harassment, for plaintiff's resignation.).

Finally, as to plaintiff's third claim of discrimination based on his national origin or Hispanic race, defendant met its burden of producing legitimate, nondiscriminatory reasons for demoting Jimenez and reducing his pay, *i.e.*, that his job performance was below acceptable levels. Paw-Paw's also produced evidence that it had demoted poorly performing white employees. Jimenez thus had to prove "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves,* 530 U.S. at 143 (quotation omitted). The jury reasonably could have found that plaintiff's evidence failed to rebut Paw-Paw's legitimate reasons for demoting Jimenez and paying him less. A decision on this claim required entirely different factual findings than for plaintiff's other two claims. Thus, the jury's verdicts on liability are consistent and supported by the evidence.

As to damages, the jury could have found, based on the evidence and its weighing of the credibility of the witnesses, that even though Paw-Paw's subjected plaintiff to a hostile work environment, Jimenez failed to prove by a preponderance of the evidence that his alleged earnings losses, out-of-pocket expenses and emotional distress or other intangible damages were caused by that particular discriminatory conduct, rather than by other causes about which there was ample evidence. As noted above, the jury rejected plaintiff's constructive discharge and discriminatory demotion claims, which might have supported his loss

of earnings claim, and implicitly accepted defendant's explanation that Jimenez was demoted for poor performance. Nonetheless, the law provides that even a poor employee must not be subjected to a workplace hostile to his race or national origin. The jury's finding that plaintiff suffered no actual harm as a result of the sustained verbal harassment and was therefore entitled to no compensatory damages was reasonable and not inconsistent with its liability finding.

The jury's liability finding that defendant's conduct justified an award of punitive damages is not inconsistent with the remainder of the verdict. By the same weighing of the evidence, the jury reasonably could have found that the hostile work environment at Paw-Paw's demonstrated that defendant acted intentionally and maliciously or with reckless indifference to plaintiff's federally protected rights, as required to award punitive damages under 42 U.S.C. § 1981a, which applies to Title VII cases. A defendant acts with malice or reckless indifference to the federally protected rights of a plaintiff if the defendant knew that it may be acting in violation of federal law or if it acted with reckless disregard of that law. *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 535 (1999). Jimenez's evidence, which the jury found credible, sufficiently demonstrated that his work environment was replete with frequent and continuous national origin slurs by managers and employees throughout his employment and that Paw-Paw's did nothing to correct such conduct, although harassment in the workplace based on national origin has been prohibited by Title VII for decades. *Patterson v. McLean Credit Union,* 491 U.S. 164, 180 (1989) (citing *Firefighters Inst. for Racial Equality v. St. Louis,*

549 F.2d 506, 514-15 (8th Cir. 1977); *Rogers v. Equal Employment Opportunity Comm'n,* 454 F.2d 234 (5th Cir. 1971)), *superseded by statute on other grounds as stated in Harrington v. Harris,* 118 F.3d 359, 367 n.8 (5th Cir. 1997); *see Louisiana ACORN,* 211 F.3d at 305 (King, C.J., dissenting in part) (punitive damages are appropriate when "racially discriminatory behavior exhibited by this defendant has been unlawful for thirty years"). The evidence in this case suffices to support an award of punitive damages under the *Kolstad* standard.

Thus, defendant is not entitled to judgment notwithstanding the verdict. For the same reasons, the jury's verdict was not against the great weight of the evidence and defendant is not entitled to a new trial on any liability issue.

3. *Plaintiff May Recover Punitive Damages Despite the Absence of a Compensatory Damages Award*

Relying on the First Circuit's opinion in *Kerr-Selgas*, 69 F.3d at 1214, Paw-Paw's argues that an award of compensatory or nominal damages is a prerequisite to a punitive damages award. Because the court must grant an award of nominal damages to Jimenez, and has done so in this order, this argument fails.

Even if the court had not awarded nominal damages, defendant's argument that Jimenez cannot recover punitive damages in the absence of compensatory or nominal damages is not founded on settled law. As current Chief Judge Berrigan of this court recently noted in a similar case,

> [d]efendants' bald assertion that compensatory damages are a necessary predicate for punitive damages under Title VII is a far from settled proposition. *Compare Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (punitive damages are available on Title VII claims even without any compensatory or nominal damage award) *with Kerr-Selgas* . . . , 69 F.3d [at] 1215 . . . (punitive damages inappropriate on Title VII claims without compensatory or nominal damages award).
>
> The Fifth Circuit has not addressed the issue for Title VII claims. In a case considering the issue for claims under the Federal Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, the court noted that "[t]here is no established federal common law rule that precludes the award of punitive damages in the absence of an award of compensatory damages." The divided panel, over Chief Judge King's dissent, ultimately held that, under the FHA, it was proper to "limit[ ] punitive damages awards, absent an actual damages award, to cases w[h]ere a violation of a constitutional right has occurred."

Barrios v. Kody Marine, Inc., No. 99-1623, 2000 WL 775067, at *4 n.4 (E.D. La. June 14, 2000) (Berrigan, J.) (quoting *Louisiana ACORN*, 211 F.3d at 301, 303 (internal quotation omitted)); *see also Cush-Crawford v. Adchem*, 271 F.3d 352, 359 (2d Cir. 2001) (punitive damages may be awarded in Title VII case without an award of nominal or compensatory damages); *Alexander*, 208 F.3d at 429 ("beyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages") (citation omitted).

Furthermore, the jury's award is not conceptually inconsistent because the two types of available damages are legally distinct and serve different purposes. "[T]he basic principle of compensatory damages [is] that the injured party should be made whole" by being compensated fully for any losses he has sustained. *Wilkerson v. Ingalls Shipbldg., Inc.*, 125 F.3d 904, 907 (5th Cir. 1997). Specifically, "the purpose of Title VII is to make injured claimants whole" by allowing them to collect compensatory damages. *Fitzgerald v. Secretary*, 121 F.3d 203, 207 (5th Cir. 1997).

On the other hand, "[p]unitive damages punish. The almost unanimous rule is that '[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.'" *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1332 (5th Cir. 1995) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981); citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) ("punitive damages are imposed for purposes of retribution and deterrence"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); Restatement (Second) of Torts § 908).

The jury in the instant case was not inconsistent in finding that Paw-Paw's had subjected Jimenez to a hostile work environment for which it should be punished and that Paw-Paw's and others like it should be deterred from similar, intentional, wrongful actions, even though Jimenez himself sustained no actual damages. *See Louisiana*

ACORN, 211 F.3d at 302 ("the societal interest in deterring or punishing violators of constitutional rights supports an award of punitive damages even in the absence of actual injury").

Accordingly, I find that the applicable law permits Jimenez to recover punitive damages in this case brought under Title VII and Section 1981, either because there is a predicate award of nominal damages or because no predicate compensatory damages award is required.

4. *The Punitive Damages Award Is Excessive*

Paw-Paw's does not argue that the punitive damages award of $161,000 was constitutionally excessive, only that it is so disproportionate to the zero compensatory damages award as to shock the conscience and that it must have been influenced by bias, passion or prejudice. Paw-Paw's seeks either a new trial or a remittitur of the punitive damages to some unspecified amount that would bring it in line with the compensatory damages award, which now stands at $1.00.

Although the evidence was sufficient to permit the jury to award some amount of punitive damages and there is no indication in this case of any bias, passion or prejudice by the jury, the court finds that the amount awarded is grossly excessive. This ruling is governed by the Supreme Court's opinion in *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996), concerning constitutionally excessive punitive damages and the Fifth Circuit's recent opinions concerning excessive punitive damages in employment discrimination cases. *Rubinstein*, 218 F.3d at 392; *Deffenbaugh-Williams v. Wal-Mart*, 156 F.3d 581, 587 (5th Cir. 1998), *reh'g en banc granted*, 169 F.3d 215 (5th Cir.), *panel*

opin. reinstated in relevant part, 182 F.3d 333 (5th Cir. 1999); *Patterson*, 90 F.3d at 927.

The plaintiff in *Rubinstein* obtained a jury verdict of $2,500 in compensatory damages and $75,000 in punitive damages on his retaliation claim under Title VII. The court entered judgment on the verdict and added a 3.5% pay raise as equitable relief for the retaliatory denial of a raise. The Fifth Circuit found that plaintiff had proved his entitlement to punitive damages under *Kolstad*, but vacated the punitive damages award as excessive and remanded for a new trial on that issue. *Rubinstein*, 218 F.3d at 396.

The *Rubinstein* court noted that its appellant/defendant, like the defendants in *Deffenbaugh-Williams* and *Patterson* (and like Paw-Paw's in the instant case), did not argue that the punitive damages award was constitutionally excessive and that the appellants failed to develop in their arguments the numerous considerations necessary to decide the excessiveness question. *Id.* at 407. Nonetheless, the Fifth Circuit found "instructive" the Supreme Court's opinion in *BMW*, which considered whether a punitive damages award was constitutionally excessive.

The Fifth Circuit applied the three "guideposts" identified in *BMW* to the punitive damages awards in *Rubinstein*, *Deffenbaugh-Williams* and *Patterson*. Those guideposts are "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and the damage award; and (3) the difference between the damages awarded in this case and comparable cases." *Patterson*, 90 F.3d at 942 (citing *BMW*, 517 U.S. at 575). Accordingly, this court considers the same guideposts

in assessing whether Jimenez's punitive damages award is excessive.

The first factor to consider and "'[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the *degree of reprehensibility* of the defendant's conduct.'" *Deffenbaugh-Williams*, 156 F.3d at 597 (quoting *BMW*, 517 U.S. at 575) (emphasis by Fifth Circuit). "It goes without saying that any form of racial discrimination is 'reprehensible'." *Id.* The jury in *Deffenbaugh-Williams*, found that plaintiff, Deffenbaugh, a white woman, was terminated from her employment because of her amorous relationship with a black man (whom she later married). Plaintiff testified that her direct supervisor told her, in front of their ultimate supervisor, Gipson, that she "would never move up in the company being associated with a black man," and that their ultimate supervisor remained silent upon hearing that comment. *Id.* at 584. Gipson denied at trial that he had been present at that meeting. He disciplined Deffenbaugh four months later for a reason she thought was pretextual, and he terminated her employment five months after the meeting for a reason that the jury found was pretextual.

When the Fifth Circuit weighed the evidence of plaintiff's single claim of discriminatory termination in the light most favorable to Deffenbaugh, it found a "close case" with only "limited evidence of ill will," which, although sufficient for the jury to infer malice under *Kolstad*, did "not reveal a *high degree of reprehensibility.* For example, there was no verbal or physical abuse." *Id.* at 597 (emphasis in original).

In *Rubinstein*, plaintiff experienced one act of retaliation in which he was denied a 3.5% pay-raise. There was

no termination, as there was in *Deffenbaugh-Williams*, yet the *Rubinstein* court found the retaliation highly reprehensible. "[T]he decision-maker responsible for setting Rubinstein's raise punished him for exercising his rights, in an act of certain ill-will towards Rubinstein. . . . [T]he act of the Dean in expressly acknowledging that he was undertaking what should be a performance-based employment decision on the basis of an employee's exercise of his federal rights is sufficient to demonstrate a high degree of reprehensibility. . . . " *Rubinstein*, 218 F.3d at 408; *see also Patterson*, 90 F.3d at 943 (defendant's "actions in falsifying documents to establish a paper trail of misconduct for [plaintiff] coupled with his racial animosity support a determination of malicious or reckless conduct justifying punitive damages").

In Jimenez's case, as in *Rubinstein* and *Patterson*, the court finds a high degree of reprehensibility in the repeated, extensive, ethnically hostile verbal abuse by Paw-Paw's managers that plaintiff experienced, as found by the jury. Unlike *Deffenbaugh-Williams*, in which there was a single incident of a racially motivated comment followed by termination of plaintiff's employment that the court did not find highly reprehensible, the jury in the instant case found extended discriminatory conduct. Paw-Paw's did not even attempt to prove at trial that it exercised reasonable care to prevent and correct promptly any racially harassing behavior toward plaintiff, but merely denied the occurrence of the slurs. The jury rejected those denials in light of the substantial evidence to the contrary presented by plaintiff.

The second *BMW* factor is whether the punitive damages award bears a reasonable relationship to the compensatory damages. The jury awarded no compensatory

damages, and the court has awarded $1.00 in nominal damages. The Eighth Circuit has held in several civil rights cases decided *before BMW* (which was neither a nominal damages case nor a civil rights case) that there is *no* "requirement that the punitive damage award bear a reasonable relationship to the nominal damages. To apply the proportionality rule to a nominal damages award would invalidate most punitive damages awards because only very low punitive damages awards could be said to bear a reasonable relationship to the amount of a nominal damages award." *Hicks*, 902 F.2d at 653 n.52 (citing *Edwards v.. Jewish Hosp.*, 855 F.2d 1345, 1352 (8th Cir. 1988); *Goodwin v. Circuit Court*, 729 F.2d 541, 542-43 (8th Cir. 1984)).

Although the Fifth Circuit has not expressly adopted this rule, the Fifth Circuit's analysis in *Louisiana ACORN* is instructive. The court held first that "[t]here is no established federal common law rule that precludes the award of punitive damages in the absence of an award of compensatory damages." *Louisiana ACORN*, 211 F.3d at 301. After reviewing its Section 1983 decisions, the Fifth Circuit held that "[t]he rule in our circuit is that in the absence of proof of actual injury, a plaintiff who has been deprived of his constitutional rights may only collect nominal damages. . . . Moreover, the societal interest in deterring or punishing violators of constitutional rights supports an award of punitive damages even in the absence of actual injury." *Id.* at 302. The court concluded that "punitive damages awards, absent an actual damages award, [should be limited] to cases w[h]ere a violation of a constitutional right has occurred." *Id.* at 303. A comparison of the ratio of punitive damages awards to awards of either zero compensatory damages or nominal damages

would invalidate most punitive damages awards. This would render the ability to award punitive damages in the absence of compensatory damages in cases of constitutional violations a nullity. However, because I have located no Fifth Circuit decisions that directly address this issue, I will examine the second *BMW* factor.

The *Rubinstein* court found that an award of punitive damages 30 times the amount of compensatory damages was unreasonable. "While no bright line exists, this award is clearly outside even the gray areas of the demarcation between acceptable levels of damages and unacceptable levels." *Rubinstein*, 218 F.3d at 408. "Rubinstein, while no doubt, and understandably, frustrated and angry as his testimony indicates, did not lose his tenured position at the University, nor was he demoted or otherwise forced to suffer consequences to his status at the university. We find that the employment decision denying Rubinstein a small percentage raise, while illegally made, was not so exceptional as to justify a multiplier of thirty." *Id.*

The Fifth Circuit in *Deffenbaugh-Williams* found it significant, in examining the jury's $100,000 punitive damages award, which was 5.26 times the $19,000 award for compensatory damages, that "[u]nlike the situation in *BMW*, the injury here was not simply economic. Deffenbaugh's termination had wide-ranging adverse personal impact and consequences. . . . In short, the ratio, standing alone, would not compel a remittitur." *Deffenbaugh-Williams*, 156 F.3d at 598.

In *Patterson*, which had been tried to the judge without a jury, the Fifth Circuit vacated a $40,000 emotional damages award and remanded with instructions to enter nominal damages. The appeals court also vacated a

$150,000 punitive damages award and remanded for a new assessment of punitive damages.

> Even if we based the punitive award on the original back-pay and benefits award of $22,648 the ratio of punitives to compensatory damages would be approximately 6.5 to 1. The Supreme Court has recognized a punitive damage award of 4 times the amount of compensatory damages to be "close to the line" in terms of constitutional propriety.

Patterson, 90 F.3d at 943 (citing *BMW*, 517 U.S. at 575).

Jimenez's situation is similar to *Rubinstein* and *Patterson*. He experienced repeated verbal abuse that, while reprehensible by defendant and naturally upsetting to plaintiff, did not rise to the level of constructive discharge. The jury obviously found that plaintiff was unable to prove that he suffered any "wide-ranging adverse personal impact and consequences" as a result of defendant's conduct. A punitive damages award of $161,000 bears no reasonable relationship to plaintiff's actual damages, or to the nominal damages award, on these facts.

Finally, in comparing the award in this case to comparable cases, the Fifth Circuit noted in *Patterson* in 1996 that "the largest punitive damage award under § 1981 in this circuit, of which we are aware to date, is $50,000." *Patterson*, 90 F.3d at 943 (citing *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 762 (5th Cir. 1986), *aff'd in part and remanded in part*, 491 U.S. 701 (1989)). The *Deffenbaugh-Williams* court two years later analyzed awards in this circuit under Title VII and Section 1981. "[W]e note that, for Title VII claims against an entity of

Wal-Mart's size, § 1981a(b)(3) imposes a maximum *combined* punitive and compensatory limit of $300,000. Obviously, the total $119,000 awarded is well below this maximum. With respect to § 1981 claims, $100,000 is on the high-end for cases of this type in our circuit." *Deffenbaugh-Williams*, 156 F.3d at 598. The court concluded that the punitive damages award of $100,000 was excessive and ordered a remittitur to $75,000.

In *Rubinstein*, having found that the $75,000 punitive damages award did not satisfy the second *BMW* factor, the Fifth Circuit concluded that it need not examine the third factor. *Rubinstein*, 218 F.3d at 408. It remitted the award to $25,000.

> While we acknowledge that this remittitur leaves the award at a level ten times the compensatory damages, we note that the Supreme Court has indicated that a ratio of ten to one does not necessarily "jar one's constitutional sensibilities." Moreover, when considered as an absolute amount as opposed to a comparative ratio, we find that a $25,000 punitive damages award is reasonable given the illegal conduct by the Dean, admitted to on the record and found by the jury to constitute malicious or reckless indifference to Rubinstein's federal rights.

Id. at 409 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993)).

In the instant case, the *BMW* factors, as applied by the Fifth Circuit in *Rubinstein*, *Deffenbaugh-Williams* and *Patterson*, lead me to conclude that the award of $161,000 in punitive damages is excessive and a remittitur should be granted. Although Paw-Paw's conduct, as found by the jury, was highly reprehensible, the amount of the award

bears no reasonable relationship to plaintiff's complete lack of actual damages and the award is $86,000 more than the highest punitive damages award approved by the Fifth Circuit in *Deffenbaugh-Williams*. *Cf. Sellers v. Gex*, No. 93-2724, 1994 WL 462988, at *4 (E.D. La. Aug. 25, 1994) (Schwartz, J.) (pre-*BMW*, jury's punitive damages award of $200,000 in employment discrimination action under Sections 1981 and 1983 was not excessive; plaintiff received $77,500 in compensatory damages), *aff'd without opin.*, 68 F.3d 469 (5th Cir. 1995).

"Having determined that an award is excessive, this court may either order a new trial on damages or may give the plaintiff the option of avoiding a new trial by agreeing to a remittitur of the excessive portion of the award." *Hernandez v. M/V Rajaan*, 841 F.2d 582, 587 (5th Cir. 1988) (citing *Osburn v. Anchor Labs., Inc.*, 825 F.2d 908, 919 (5th Cir. 1987); *Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 684 (5th Cir. 1986)); *accord Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 182 (5th Cir. 1995). This rule applies in cases of excessive punitive damages, and a new trial may be ordered solely on the punitive damages issue if the plaintiff declines to accept the remittitur. *Rubinstein*, 218 F.3d at 409; *Deffenbaugh-Williams*, 156 F.3d at 598; *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 306-07 (4th Cir. 1998); *Continental Trend Resources, Inc. v. Oxy USA Inc.*, 101 F.3d 634, 643 (10th Cir. 1996); *Lee v. Edwards*, 101 F.3d 805, 813 (2d Cir. 1996); *Morgan v. Woessner*, 997 F.2d 1244, 1258-59 (9th Cir. 1993).

"To determine the size of the remittitur, we follow the 'maximum recovery rule,' reducing the damages to the maximum amount a reasonable jury could have awarded. Of course, our reassessment of damages cannot be supported entirely by rational analysis, but involves an

inherently subjective component." *Giles v. General Elec. Co.*, 245 F.3d 474, 488-89 (5th Cir. 2001) (quotation and citations omitted); *accord Deffenbaugh-Williams*, 156 F.3d at 597.

Application of the foregoing complex standards in determining an appropriate punitive damages remittitur is difficult. The conduct found by the jury in the instant case, an extensive pattern of repeated, long-term verbal abuse, was highly reprehensible, which is the most important factor to consider. In this regard, the conduct found by the jury in the instant case was worse than that in *Deffenbaugh-Williams*, in which the Fifth Circuit found no "high degree of reprehensibility," including "no verbal . . . abuse," 156 F.3d at 597, and remitted the $100,000 award to $75,000. Thus, a punitive damages award slightly in excess of the remitted award in *Deffenbaugh-Williams* appears appropriate. Given the facts of this case, the jury's findings on liability and the deterrence and punishment goals of a punitive damages award, I find that the award should be reduced by approximately one-half to $80,000, which is the maximum amount that a reasonable jury could have awarded. While the ratio of even this remitted punitive award to compensatory damages (80,000 to 1 if the nominal damages amount is employed as the comparator) remains far in excess of any other ratio that has been affirmed in the reported case law, I see no mathematical method to compute an acceptable ratio that would vindicate the deterrence and punishment purposes of punitive damage awards in a nominal damages civil rights case in which the jury's punitive damages liability finding is supported by the evidence. If Jimenez declines to accept this remittitur, then a new trial will be granted on punitive damages only.

E. Plaintiff's Motion for Attorney's Fees and Costs

1. *Plaintiff Is Entitled to Reasonable Attorney's Fees and Costs*

Jimenez brought this action under Title VII and Section 1981. Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k). Similarly, 42 U.S.C. § 1988 provides that "[i]n any action to enforce a provision of sections 1981 [or] 1981a . . . , the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. Attorney's fees should be awarded to a prevailing plaintiff in all but special circumstances. *White v. South Park Indep. Sch. Dist.*, 693 F.2d 1163, 1169 (5th Cir. 1982).

"Under [the Supreme Court's] generous formulation of the term, plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar*, 506 U.S. at 109 (quotations omitted).

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain . . . an enforceable judgment against the defendant from whom fees are sought. . . . Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. . . . In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111-12. The Supreme Court in *Farrar* squarely held that a civil rights plaintiff who receives a judgment vindicating his constitutional rights, thus obtaining at least some relief on the merits, is a prevailing party even if he receives only nominal damages. *Id.* at 112.

"A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113. Jimenez is clearly the prevailing party in this litigation, having received a verdict and judgment in his favor on one of his three claims, including nominal damages (following the court's additur ruling) and significant punitive damages.

Having determined that Jimenez is the prevailing party, the court next must consider whether he is entitled to any attorney's fees under the reasonableness inquiry. "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives *no more than nominal damages* is often such a prevailing party." *Id.* at 115 (emphasis added).

In the instant case, Jimenez sought and received significantly more than nominal damages in the form of punitive damages. He is therefore entitled to an award of reasonable attorney's fees under Title VII and Section 1988. *See Hopwood v. State*, 236 F.3d 256, 278 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 2550 (2001) (affirming award of attorney's fees to plaintiffs who achieved their "principal goal" of striking down racial preferences in higher education admissions, although they received no injunctive or monetary relief) (citing *Farrar*, 506 U.S. at 112); *Riley v.*

City of Jackson, 99 F.3d 757, 760 (5th Cir. 1996) (plaintiffs achieved more than mere "technical victory" when they obtained nominal damages and most of the injunctive relief they had sought); *Pembroke v. Wood County*, 981 F.2d 225, 230-31 & n.27 (5th Cir. 1993) (prisoners who waived monetary damages but who proved constitutional violations that were incorporated into jury charges were entitled to reasonable attorney's fees because their lawsuit caused defendants to remedy unconstitutional conditions and they were prevailing parties despite verdict in favor of defendants); *Doughtie v. City of Corinth*, No. 3:93CV163-D-A, 1997 WL 786765, at *2 (N.D. Miss. Dec. 1, 1997) (plaintiff achieved more than nominal victory when he prevailed on one of several claims, received nominal damages and effected change in defendant's behavior by filing suit, although change did not result directly from a court order); *see also Johnson v. Eaton*, 80 F.3d 148, 152 (5th Cir. 1996) (affirming award of attorney's fees to plaintiff in Fair Debt Collection Practices Act case; jury found that plaintiff suffered no actual damage from defendant's statutory violations; jury's award of "'additional' or punitive damages [under the statute], designed to punish [defendant] for his wrongful acts," qualified plaintiff as "successful" under attorney's fees provision of statute).

2. *The Lodestar Method*

Determination of the reasonableness of plaintiff's request for attorney's fees is a two-step process that begins with determination of the "lodestar" amount.

> A lodestar is calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such

> work. After making this calculation, the district court may decrease or enhance the lodestar based on the relative weights of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The lodestar may not be adjusted due to a *Johnson* factor, however, if the creation of the lodestar award already took that factor into account. Such reconsideration is impermissible double-counting.

Heidtman v. County of El Paso, 171 F.3d 1038, 1043 (5th Cir. 1999) (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Shipes v. Trinity Indus.*, 987 F.2d 311, 319-20 (5th Cir. 1993)).

The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) the award in similar cases.

Johnson, 488 F.2d at 717-19.

"[O]f the *Johnson* factors, the court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998) (citation omitted). Three of the *Johnson* factors, complexity of the

issues, results obtained and preclusion of other employment, are fully reflected and subsumed in the lodestar amount. *Heidtman*, 171 F.3d at 1043 (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Shipes*, 987 F.2d at 319-22 & n.9). More recently than the *Johnson* case, the "Supreme Court has barred any use of the sixth factor," *i.e.*, whether the fee is fixed or contingent. *Walker v. United States Dep't of Housing & Urban Dev.*, 99 F.3d 761, 772 (5th Cir. 1996) (citing *City of Burlington*, 505 U.S. at 567; *Shipes*, 987 F.2d at 323).

"The lodestar ... is presumptively reasonable and should be modified only in exceptional cases." *Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993) (citing *City of Burlington*, 505 U.S. at 562); *accord Heidtman*, 171 F.3d at 1043. Although the party seeking attorney's fees bears the initial burden of submitting adequate documentation of the hours reasonably expended and of the attorney's qualifications and skill, the party seeking reduction of the lodestar bears the burden of showing that a reduction is warranted. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Wegner v. Standard Ins. Co.*, 129 F.3d 814, 822 (5th Cir. 1997); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 329 (5th Cir. 1995) (hereinafter *"LP & L"*).

Jimenez seeks $98,480 in attorney's fees based on an initial hourly rate of $187.50, with a requested upward adjustment to $200 per hour, for 492.4 hours spent in prosecution of the case from August 8, 2001, the date when he hired his current counsel, J. Christian Lewis, through post-trial work. He also seeks $3,012 in fees for 50.2 hours of work performed by two paralegals at an hourly rate of $60. He does not seek an award of attorney's fees for the work of the two attorneys who represented him from the

date of filing this lawsuit in June 2000 until they withdrew on April 2, 2001.

3. *The Hourly Rates Charged by Plaintiff's Counsel*

First, I must determine whether the hourly rates of $187.50, adjusted upward to $200, requested for the work of plaintiff's counsel and of $60 for his paralegals were reasonable. Plaintiff's attorney, J. Christian Lewis, states in his affidavit that he graduated from Tulane Law School in 1992 and has practiced law since 1994, a total of only eight years. He avers that he has focused on employment law and civil rights law for individuals since 1999, only three years, with employment matters representing approximately 80% of his current practice. He does not state what rate he customarily charges. His office is located in Lafayette. He states that he was recently awarded $175 per hour by an administrative law judge in a worker's compensation case. Finally, he notes that his contingency contract with Jimenez provides for the greater of 1/3 of the amount recovered or $175 per hour. Plaintiff's Exh. A.

Plaintiff bases his request for a base hourly rate of $187.50 on the affidavits of Audrey Browne and William McGoey, attorneys who practice employment law in New Orleans. Browne states that she has practiced employment and discrimination matters exclusively since she graduated from Tulane Law School in 1992 and that "approximately $200.00" is a fair and appropriate hourly rate for employment matters in this market. Plaintiff's Exh. D. McGoey states that he has engaged in a federal

litigation practice with a focus on employment and discrimination matters since 1985. He opines that $175 is a fair and appropriate hourly rate for an attorney with Lewis's knowledge and experience and that attorneys with 15 or more years of experience often charge $200 or more per hour. Plaintiff's Exh. E. Plaintiff averages the rates recommended by Browne and McGoey to come up with a requested base rate of $187.50 per hour, and requests an upward adjustment to $200 based on the posture and complexity of the case when Lewis was hired.

An attorney's requested hourly rate is prima facie reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates and the rate is not contested. *LP & L*, 50 F.3d at 328. Here, Paw-Paw's challenges the requested rate as unreasonable because Lewis has practiced employment law only since 1999; the highest award he has received was $175 per hour from an ALJ; the amount of time Lewis spent on the case reflects not complexity but his inexperience; and McGoey states that attorneys with 15 years of experience receive $200 per hour.

It is well established that fees for paralegal time are recoverable. *Missouri v. Jenkins,* 491 U.S. 274, 288 (1989); *Volk v. Gonzalez,* 262 F.3d 528, 535 (5th Cir. 2001); *Walker,* 99 F.3d at 773; *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.,* 919 F.2d 374, 380 (5th Cir. 1990). Defendant does not contest the requested rate of $60 per hour for paralegal Wayne M. Lemoine, whose affidavit states that he received a paralegal certificate in May 1996 and he has worked as a paralegal with plaintiff's law firm for four and one-half years. Lemoine states that $60 per hour is a reasonable and customary rate for

paralegal services in this state and as billed to clients under a fee contract. Plaintiff's Exh. B. However, Paw-Paw's asserts that Kathy M. Darby, whose affidavit states that she received a paralegal certificate in 1997 and has worked for plaintiff's law firm as a legal secretary for one and one-half years, Plaintiff's Exh. C, should receive a lower rate than Lemoine. I find that $60 per hour is a reasonable rate for paralegal services rendered by both Lemoine and Darby.

However, I find that the $187.50 to $200 hourly rate sought by Lewis for his work is not reasonable. While I have seriously considered the opinion expressed in the affidavit of McGoey, a frequent practitioner of employment discrimination law, whose skill, reputation and expertise in the field of employment litigation are well-known to and respected by this court, I cannot accept that a lawyer of Lewis's limited experience, eight years in actual practice with only three years of emphasis in the relevant practice area, should be awarded $175 per hour, as McGoey opines. For example, McGoey himself, an employment litigation specialist with far more experience than Lewis, received a fee award from Judge McNamara of this court in a Title VII case about a year ago of only $150 per hour. *Dufresne v. J.D. Fields & Co., Inc.*, C.A. No. 99-3714-D, Record Doc. No. 83 (December 19, 2001).

In addition, my own experience in this court in reviewing and evaluating requests for awards of attorney's fees convinces me that the requested rate is not reasonable. I have become familiar with Lewis's experience and skill as he has prosecuted this case, and I am personally familiar with the range of attorney's customary billing rates in this legal community. I find that an hourly rate of $175 or above for his work in this case would be excessive

and not customary in this community. Rather, I find that an hourly rate of $175 or above would be higher than the range of prevailing market rates for lawyers with comparable experience and expertise in litigation of this type.

In addition to the recent award of $150 per hour to McGoey mentioned above, my research indicates that the following attorney's fee awards have been made in both similar and more complicated cases in this court.

1. In a civil rights case last year, Judge Vance awarded $150 per hour to an attorney who had been admitted to the bar in 1977. *Oyefodun v. City of New Orleans,* No. 98-3283, 2001 WL 775574, at *9 (E.D. La. July 9, 2001).

2. Judge Livaudais awarded $185 per hour last year to a civil rights attorney with 25 years of experience. *Lalla v. City of New Orleans,* 161 F. Supp. 2d 686, 699 (E.D. La. 2001).

3. In a qui tam case in 1999, Judge Duval awarded hourly rates of $250, $175 and $150 for partner-level attorneys with substantial experience. He awarded rates at the high end of each attorney's usual range because of the particular difficulty of the case and the lucrative and less risky business the lawyers were precluded from accepting. *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.,* 46 F. Supp. 2d 546, 569 (E.D. La. 1999), *vacated on other grounds,* 244 F.3d 486 (5th Cir. 2001).

4. In *Yousuf v. UHS of De La Ronde, Inc.,* 110 F. Supp. 2d 482, 490-91 (E.D. La. 1999), Judge Livaudais awarded $195 per hour to

an attorney who had practiced civil rights litigation for 24 years.

5. In 1998, in an action challenging the constitutionality of a public school board's resolution, Judge Livaudais held that while "$175 is arguably within the realm of reasonable awards, an hourly rate of $150 is appropriate." *Freiler v. Tangipahoa Parish Bd. of Educ.,* No. 94-3577, 1998 WL 2852, at *3 (E.D. La. Jan. 5, 1998), *aff'd,* 185 F.3d 337, 349 (5th Cir. 1999).

6. Judge Berrigan held in 1997 that $150 per hour was reasonable in an employment discrimination action, after finding that counsel had practiced employment discrimination law since 1988 and had become an authority in the field. *Smith v. Berry Co.,* No. 96-1899, 1997 WL 736697, at *4 (E.D. La. Nov. 21, 1997).

7. In a Title VII action in 1996, Judge Berrigan awarded $175 per hour to counsel who had been practicing employment discrimination law since 1988. *Douglas v. DynMcDermott Petroleum Operations Co.,* No. 95-1967, Record Doc. No. 203 (unreported decision; cited in *Smith,* 1997 WL 736697, at *4).

8. In *Police Ass'n of New Orleans v. City of New Orleans,* 951 F. Supp. 622, 628 (E.D. La. 1997), then Chief Judge Sear held that $150 per hour was reasonable in a Section 1983 action, based upon plaintiffs' counsel's 22 years of experience as a civil rights attorney and the Chief Judge's own knowledge of attorneys' fees in this district.

9. In *Blanchard v. Forrest,* No. 93-3780, 1996 WL 125955, at *2-3 (E.D. La. March 19, 1996), an "exceedingly complex" class action brought under Section 1983 against the State of Louisiana, which required "specialized knowledge of the controlling [Medicaid] regulations" and resulted in a consent decree, Judge Porteous found that hourly rates of $175 for a senior attorney with 25 years of varied litigation experience, $125 for a public interest litigator with slightly less experience, $80 for a second-year associate and $35 for student law clerks were customary and reasonable in this district.

10. Finally, in an age discrimination case tried in 1995, Magistrate Judge Africk awarded hourly rates of $175 for an attorney who had practiced law for 23 years, $150 for an attorney who had practiced for 15 years and $125 for an attorney who had practiced for 9 years with 6 years of specialization in disability rights. *Grantham v. Moffett,* No. 93-4007, 1996 WL 3750, at *4 (E.D. La. Jan. 3, 1996) (Africk, M.J.), *aff'd,* 101 F.3d 699 (5th Cir. 1996).

As a general matter, the foregoing decisions support a reasonable hourly rate of $175 for lawyers with far more experience and expertise in the employment law field than plaintiff's counsel in the instant case. Considering all of the foregoing factors, I find that a reasonable hourly rate for Lewis in this case is $150. Whether there should be any upward adjustment of the lodestar amount is considered below.

4. *The Hours Charged by Plaintiff's Counsel*

Next, I must determine the reasonable number of hours that plaintiff's counsel expended on the litigation. Jimenez seeks reimbursement for 492.4 hours expended by Lewis, 40.7 hours expended by paralegal Lemoine and 9.5 hours expended by paralegal Darby.

The burden of proving the reasonableness of the hours expended is on the fee applicant. *Mota,* 261 F.3d at 528. As a general proposition, all time that is excessive, duplicative or inadequately documented should be excluded from any award of attorney's fees. *Watkins,* 7 F.3d at 457. Attorneys must exercise "billing judgment" by "writing off unproductive, excessive, or redundant hours" when seeking fee awards. *Walker,* 99 F.3d at 769. The fee seeker's attorneys "are charged with proving that they exercised billing judgment." *Id.* at 770. When billing judgment is lacking, the court must exclude from the lodestar calculation the hours that were not reasonably expended. *Hensley,* 461 U.S. at 434.

Defendant specifically challenges the following types of entries.

a. *Attorney Familiarization Time*

Paw-Paw's objects to paying for the time spent by Lewis to familiarize himself with the history and posture of this case. This objection is not well founded. While plaintiff hired and fired several attorneys to handle this matter, the fee application does *not* reflect imprudent duplication of effort. Lewis began working diligently on the case as soon as he enrolled as counsel, when defendant's motion for summary judgment was pending and a jury trial was set for a date only three months away. He

was obligated to familiarize himself with the history and posture of this case and prudent to do so. No request for duplicative compensation for the time spent by his predecessor plaintiff's counsel has been made. Accordingly, *no* deductions from Lewis's initial time entries reflecting attorney familiarization time will be made.

b. *Non-Attorney Work*

Defendant urges that the attorney's hourly rate should not be applied to clerical, administrative or paralegal work and that the paralegal's hourly rate should not be applied to clerical or administrative work. These objections have merit.

"Normally, clerical or secretarial costs are part of an attorney's office overhead and are reflected in the billing rate." *Hagan v. MRS Assocs., Inc.,* No. 99-3749, 2001 WL 531119, at *9 (E.D. La. May 15, 2001) (Africk, M.J.) (citing *Jane L. v. Bangerter,* 61 F.3d 1505, 1517 (10th Cir. 1995); *In re North,* 59 F.3d 184, 195 (D.C. Cir. 1995)) (additional citations omitted). It is well established that "when an attorney performs a task that could be handled by clerical staff, the opponent should not be charged the attorney's hourly rate." *Sassaman v. Heart City Toyota,* 879 F. Supp. 901, 918 (N.D. Ind. 1994) (quotations omitted); *see Jenkins,* 491 U.S. at 288 n.10 (clerical and other non-legal work should not be billed at attorney's rate); *Harris v. L & L Wings, Inc.,* 132 F.3d 978, 985 (4th Cir. 1997) (secretarial tasks); *Abrams v. Baylor College,* 805 F.2d 528, 535-36 (5th Cir. 1986) (clerical work); *Hagan,* 2001 WL 531119, at *9 (faxing); *Barrilleaux v. Thayer Lodging Group, Inc.,* No., 97-3252, 1999 WL 397958, at *2 (E.D. La. June 11, 1999) (Livaudais, J.) (clerical and administrative tasks); *Inks v.*

Healthcare Distribs. of Ind., Inc., 901 F. Supp. 1403, 1416 (N.D. Ind. 1995) (delivery of documents); *A.N. v. Handy*, No. 86 C 9486, 1995 WL 571828, at *2 (N.D. Ill. Sept. 22, 1995) (mailing papers and filing pleadings).

I find that some of the tasks which defendant disputes are *not* clerical. Preparation of service of process materials, deposition notices, deposition summaries and subpoenas, although sometimes done by paralegals under attorney supervision, is legal, not clerical, work. Defendant also objects to Lewis's entries for "typing." However, these entries indicate that Lewis was in fact composing and revising his opening statement, witness questions, summaries of testimony and closing argument before and during the trial, presumably on a portable computer. Although the use of the word "typing" may be ill advised because of its clerical connotations, composing and organizing trial presentation materials constitute legal work. No reductions will be made for these tasks.

However, some of Lewis's time entries reflect clerical or administrative work. Examples of clerical work include copying, faxing, loading files, labeling exhibits, mailing, filing pleadings, calling court reporters and process servers, serving a subpoena, delivering documents and pulling files. Administrative matters include Lewis's meetings with or memoranda to his partner, Glenn Armentor (who withdrew as counsel of record in this case), concerning case status, case prospects and expenses; memoranda to or meetings with paralegal/secretary Darby about billing, mileage calculation and expenses; preparing check requests; telephone calls to and inspections of hotels; meeting with Lemoine about time recordation; and research about local admission to Alabama and calls to attorneys in

Alabama, Missouri and New Orleans apparently seeking co-counsel.

Lewis's time records indicate all of the tasks performed and a grand total of hours for each date. While this is permissible documentation for a busy lawyer and the Fifth Circuit does not require itemization of time for each task, it makes this court's task in assessing reasonable hours somewhat more difficult. Rather than itemize each date on which clerical and administrative tasks occurred and attempt to calculate how much time each task took, the court will reduce Lewis's overall time by 5% to reflect these tasks.

For the same reasons, paralegal time spent on clerical and administrative tasks cannot be charged to Paw-Paw's. Therefore, Lemoine's overall time of 40.7 hours will be reduced by 5% to reflect tasks such as planning for travel, packing and loading files for travel and checking into the hotel, and Darby's overall time of 9.5 hours will be reduced by 5% for making copies.

c. *Travel Time*

Lewis practices in Lafayette, Louisiana, approximately 135 miles from New Orleans. Plaintiff requests reimbursement at the attorney's full hourly rate for Lewis's travel time to New Orleans for hearings and trial, as well as to other locations in Louisiana and Alabama for depositions. He also requests the paralegal's full hourly rate for Lemoine's travel time to New Orleans to attend the trial.

Attorney travel time should be compensated at a lower rate than legal work. Courts in this circuit typically

compensate travel time at 50% of the attorney's rate in the absence of documentation that any legal work was accomplished during travel time. *Watkins,* 7 F.3d at 459; *Hopwood v. State,* 999 F. Supp. 872, 914 (W.D. Tex. 1998), *aff'd in relevant part & rev'd in part on other grounds,* 236 F.3d 256, 281 n.107 (5th Cir. 2000), *cert. denied,* 121 S. Ct. 2550 (2001); *Jackson v. Capital Bank & Trust Co.,* No. 90-4734, 1994 WL 118322, at *26 (E.D. La. Mar. 30, 1994) (Heebe, J.); *Smith v. Walthall Co.,* 157 F.R.D. 388, 393 (S.D. Miss. 1994) (Wingate, J.). No such documentation exists in this case. Accordingly, the portions of Lewis's time entries that reflect travel time will be reduced by 50% for the following dates.

DATE	DESTINATION	MILES FROM LAF.	ROUND TRIP HOURS	HOURS DEDUCTED
09/24/01	Hammond	101	4.00	2.00
09/26/01	Mobile	256	9.00	4.50
09/27/01	Baton Rouge	57	2.40	1.20
10/19/01	New Orleans	135	5.00	2.50
10/24/01	New Orleans	135	5.00	2.50
11/01/01	New Orleans	135	5.00	2.50
11/12-16/01	New Orleans	135	5.00	2.50
		TOTALS	35.4	17.7

Lemoine's travel time to New Orleans on November 12th and back to Lafayette on November 16th will be similarly reduced, for a reduction in his time of 2.5 hours.

d. *Excessive and Unnecessary Hours*

Defendant argues that plaintiff's counsel was overly contentious and inexperienced, which allegedly led to unnecessary, duplicative and excessive billing entries. Specifically, defendant challenges only Lewis's entries for clerical, administrative and paralegal tasks, which have already been discussed above.

Paw-Paw's takes issue with Lewis's assertion that he should recover all of his time because he "devoted [his] practice almost entirely to this case" once he enrolled. Paw-Paw's attributes this to Lewis's alleged inexperience and contentiousness rather than the time pressure he faced upon enrolling as plaintiff's counsel from the pending motion for summary judgment, the trial date in three months, the posture of discovery and the complexity of the case.

Lewis's experience has already been taken into account in determining his hourly rate. As for contentiousness, the court finds that counsel for both parties share the blame for excessive motion practice and lack of cooperation in this case. No additional reduction will be made based on this argument.

In light of defendant's objections and in accordance with the standards set forth in *Hensley,* this court has undertaken a review of the time records in conjunction with the written submissions at issue to exclude any "excessive, redundant, or otherwise unnecessary" hours. *Hensley,* 461 U.S. at 433-45.

Plaintiff's fee statements are generally well documented. However, some of the entries, such as "read memo from GA [Glenn Armentorl," "memo to GA re: client," "read

two cases," "review documents," "read statements," "call [or letter] from/to/with witness," "call to shellhorse," "draft affidavit," "pulled file from W.D. LA," "review file of discovery" and "spoke with client's friend," are too vague for the court to determine whether they represent a reasonable use of time. *See Walker,* 99 F.3d at 773 (rejecting fee request that contained "terse listings" such as "'library research,' 'analyzing documents,' 'reading background documents,' 'phone interviews,' with no further explanation . . . . [N]o responsible client would accept these records as capable of supporting a bill."); *LP & L,* 50 F.3d at 326 n.11 (vague entries such as "revise memorandum," "review pleadings," "review documents" and "correspondence" inadequate to support fee request); *Von Clark v. Butler,* 916 F.2d 255, 259 & n.6 (5th Cir. 1990) (criticizing as "scanty and lacking in explanatory detail" entries such as "'telephone ca[illegible],' or 'trial preparation,' or 'travel to Beaumont to attend deposition' without any identification whatsoever of the subject matter").

Further, there is no evidence that plaintiff's attorney exercised billing judgment by writing off unproductive, duplicative or excessive time. The court cannot determine the actual time spent on each task because of Lewis's listing of all tasks accomplished in a single day in a lump total. Accordingly, the court will deduct 5% from Lewis's requested hours for vagueness and failure to exercise billing judgment.

5. *Calculation of the Lodestar*

In summary, I find that the requested 492.4 hours for Lewis should be reduced by 17.7 hours of travel time, 5% for clerical work and 5% for vagueness and lack of billing

judgment, so that the reasonable number of attorney hours is 425.46. The requested 40.7 hours for paralegal Lemoine is reduced by 2.5 hours for travel time and 5% for clerical work to 36.165 hours. Paralegal Darby's time of 9.5 hours is also reduced 5% for clerical work to 9.025 hours. Thus, the reasonable number of paralegal hours is 45.19 hours.

After making these reductions in hours, I find that the lodestar amount of reasonable hours multiplied by the reasonable rates set forth above is generally reasonable in this case with two reservations, specifically that plaintiff's counsel was faced with significant time limitations imposed by the court when he enrolled as counsel and the case was undesirable. Plaintiff has requested an upward adjustment in the customary hourly rate. The lodestar should be enhanced or reduced only in exceptional cases. *Watkins,* 7 F.3d at 457 (citing *City of Burlington,* 505 U.S. at 562). In making this determination, I have considered and applied the factors articulated in *Johnson,* as required by the Fifth Circuit. *Riley,* 99 F.3d at 760; *LP & L,* 50 F.3d at 331. Those factors have been evaluated as follows.

(1) The time and labor required have already been considered in reaching the lodestar. (2) The questions involved in this case were neither novel nor difficult. (3) The skill required to perform the legal service properly is connected to the second factor and has already been taken into account in the attorney's hourly rate. (4) Although Lewis attests that he was precluded from taking other employment, the Fifth Circuit has held that this factor is already "fully reflected and subsumed in the lodestar amount." *Heidtman,* 171 F.3d at 1043. (5) After the reductions discussed above, the fees charged were customary; this factor has already been taken into account. (6) The

contingent fee contract cannot as a matter of law be used to affect the lodestar. (7) There were significant time limitations imposed by the circumstances, and this is a factor that weighs in favor of enhancement. When Lewis enrolled as counsel, plaintiff was unrepresented. Several motions filed by defendant were pending and required immediate response. The trial date was only about three months away. Because the case had been delayed in its prosecution, and trial had already been previously continued, the court insisted on maintaining the November 2001 trial date. Under these circumstances, Lewis's assertion in his affidavit that he devoted virtually his full time to the case during the weeks preceding trial is credible, and this factor has not adequately been taken into account in determining the hourly rate. (8) The amount involved was not extraordinary and the result obtained was only partially successful, which has already been taken into account. (9) The experience, reputation, and ability of counsel has already been considered in determining the lodestar. (10) The case was undesirable, and this is a second factor that weighs in favor of enhancement. Two attorneys had already withdrawn and plaintiff had trouble finding a new one. At the time Lewis enrolled, with only three months before trial, plaintiff was unrepresented. (11) Plaintiff's relationship with counsel is unknown. (12) Awards in similar cases have already been discussed.

Given that only two of the twelve factors weigh in favor of enhancement, I find that a small upward adjustment should be made to the lodestar, as set out above. An upward adjustment to the hourly rate, from $150 to $160, appropriately reflects an adequate adjustment that accounts for these factors. The reasonable hours multiplied by the attorney's reasonable hourly rate (425.46 x $160),

upwardly adjusted by $10 per hour, yields an award of $68,073.60. The reasonable hours multiplied by the paralegal's reasonable hourly rate (45.19 x $60) yields an award of $2,711.40. As adjusted, the total amount of the award is $70,785.

6. *Costs*

Plaintiff seeks $6,070.12 in costs. Record Doc. Nos. 162, 169. Lewis states in his affidavit that the out-of-pocket expenses listed on the attached ledger of expenses were incurred in the prosecution of plaintiff's claims and are typically paid by the client at the time of disbursement. Lewis affidavit, Plaintiff's Exh. A; affidavit Exh. 2. Defendant disputes some of the requested costs.

"[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); *accord Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.,* 71 F.3d 198, 205 n.5 (5th Cir. 1995). A party who obtains a favorable judgment on some of its claims may be regarded as a prevailing party, even if it has not sustained all of its claims. *Id.* Taxation of costs under Rule 54(d) is within the district court's discretion. *Breaux v. City of Garland,* 205 F.3d 150, 164 (5th Cir.) (citation omitted), *cert. denied,* 531 U.S. 816 (2000).

The Fifth Circuit recently clarified the statutory sources of and limitations on cost awards in Title VII cases.

> Under 28 U.S.C. § 1920, a court may tax the following costs: fees of the clerk and marshal; fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for

> use in the case; fees and disbursements for printing and witnesses; fees for exemplification and copies of papers necessarily obtained for use in the case; docket fees; compensation of court-appointed experts, interpreters, and special interpretation services. The Supreme Court has indicated that federal courts may only award those costs articulated in section 1920 absent explicit statutory or contractual authorization to the contrary.
>
> In Title VII cases, a district court has an additional source of authority for applying attorney's fees and costs, 42 U.S.C. § 2000e-5(k). This provision empowers the court to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This Court has interpreted the "attorney's fee" allowed by Section 2000e-5(k) to include reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services, such as postage, photocopying, paralegal services, long distance telephone charges, and travel costs.

Mota, 261 F.3d at 529 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 444-45 (1987)) (quotation and additional citations omitted).

When cost-seekers neglect to supply any verification that the costs claimed were "necessarily incurred in the case" and instead state only that the costs were expended "in the preparation and litigation of this case," the district court does not abuse its discretion by denying all costs except filing fees. *Phetosomphone v. Allison Reed Group, Inc.,* 984 F.2d 4, 9 (1st Cir. 1993); *accord Home Builders Ass'n v. City of Madison,* 191 F.R.D. 515, 517, 518, 519 (N.D. Miss. 1999) (Wingate, J.) (citing *Fogleman v. ARAMCO,* 920 F.2d

278, 286 (5th Cir. 1991); *Studiengesellschaft Kohle v. Eastman Kodak,* 713 F.2d 128, 133 (5th Cir. 1983)). Before the court can tax costs, it must find that the costs were necessarily incurred in the litigation and this finding must be based on "some proof of the necessity." *Holmes v.. Cessna Aircraft Co.,* 11 F.3d 63, 64 (5th Cir. 1994) (citing *Fogleman,* 920 F.2d at 286; *Studiengesellschaft Kohle,* 713 F.2d at 133). "The Court does have discretion to allow unverified costs where it is clear from the nature of the cost that it was necessarily incurred." *Johnson v. State,* No. 98-266T, 2000 WL 303305, at *13 (D.R.I. Mar. 22, 2000) (quotation omitted) (citing *Phetosomphone,* 984 F.2d at 9).

In this case, plaintiff seeks reimbursement of the costs of serving subpoenas, express delivery charges, witness fees, court reporter fees, one video and one telephone deposition, deposition transcripts, long distance telephone calls, calls to information, photocopies, long distance faxes, postage, envelopes and travel expenses (including parking, gasoline, mileage, lodging and food) for his attorney's attendance at trial, depositions and court hearings, and for paralegal Lemoine's expenses to attend the trial. Plaintiff's Exh. A, affidavit Exh. 2. Plaintiff's documentation of all of these expenses and his "proof" that they were "necessarily incurred" is minimal at best. For unexplained reasons, plaintiff's attorney rounded off all long distance telephone calls and long distance faxes to $2.00 per call, regardless of actual length or cost. Because of these inadequacies, the court exercises its discretion to exclude all expenses not listed in Section 1920.

Postage is not recoverable as a cost because it is not listed in Section 1920. *Johnson,* No. 98-266T, 2000 WL 303305, at *14; *Yasui v. Maui Elec. Co.,* 78 F. Supp. 2d

1124, 1126 (D. Haw. 1999); *Embotelladora Agral Regiomontana, S.A. de C.V. v. Sharp Capital, Inc.,* 952 F. Supp. 415, 417 (N.D. Tex. 1997) (Boyle, M.J.) (citations omitted). "Telecopy expenses, express delivery charges, and telephone expenses, like postal expenses, are not listed in the statute and represent 'overhead' costs, not litigation costs." *Id.* (citations omitted); *see also Yasui,* 78 F. Supp. 2d at 1129, 1130 (facsimile and long distance charges not taxable as costs); *cf. Migis,* 135 F.3d at 1048 (in Title VII action, trial court did not abuse its discretion by denying costs of couriers, postage and copying). Accordingly, the court will deduct the costs of postage ($57.91), faxes ($230.00), express delivery ($156.60) and telephone calls ($314.25) listed on plaintiff's Ledger of Expenses as Item Nos. 3-5, 29-30, 36, 38, 40 and 41, plus $10 for long distance calls and faxes listed in plaintiff's supplemental memorandum. These items total $768.76.

Furthermore, "the travel expenses of attorneys are not recoverable under § 1920." *Embotelladora,* 952 F. Supp. at 418 (citing *Coats v. Penrod Drilling Corp.,* 5 F.3d 877, 891 (5th Cir. 1993); *Roche v. City of Normandy,* 566 F. Supp. 37, 42 (E.D. Motion. 1983)); *accord Hodge v. Seiler,* 558 F.2d 284, 287 (5th Cir. 1977); *Odom v. Frank,* 782 F. Supp. 50, 52 (N.D. Tex. 1991). The same rule applies to a paralegal's travel expenses. Therefore, Jimenez will not be permitted to recover Ledger of Expense Item Nos. 6-8, 27-28, 33, 35, and 37, totaling $2,852.84 in travel costs.

Plaintiff requests the cost of 77 envelopes in Item No. 42. Office supply purchases are considered overhead and are not taxable as costs. *Mary M. v. North Lawrence Community Sch. Corp.,* 951 F. Supp. 820, 829 (S.D. Ind.), *rev'd on other grounds,* 131 F.2d 1220 (7th Cir. 1997); *Bridges v. Eastman Kodak Co.,* No. 91 CIV. 7985 (RLC),

1996 WL 47304, at *15 (S.D.N.Y. Feb. 6, 1996), *aff'd,* 102 F.3d 56 (2d Cir. 1996); *In re Media Vision Tech. Secs. Litig.,* 913 F. Supp. 1362, 1371 (N.D. Cal. 1996); *Hertz Corp. v. Caulfield,* 796 F. Supp. 225, 230 (E.D. La. 1992) (Mentz, J.). This cost request of $11.55 is disallowed.

Defendant contests the cost of serving a trial subpoena on Dr. Burl Forgey, contending that Dr. Forgey did not attend the trial at plaintiff's request. However, Dr. Forgey himself requested that he be excused from the subpoena because of a previously planned trip out of town, and the parties, after an initial dispute, were eventually able to agree that his testimony would be presented by deposition. Record Doc. Nos. 129, 143. This cost is allowed.

Finally, the court quashed plaintiff's improper trial subpoena to representatives of the Equal Employment Opportunity Commission, Record Doc. No. 148, and will therefore not allow the $41.00 service cost of this subpoena (Item No. 35 on plaintiff's Ledger of Expenses).

In summary, the court deducts the following costs described above: $768.76, $2,852.84, $11.55 and $41.00, for a total deduction of $3,674.15. After these deductions ($6,070.12 minus $3,674.15), plaintiff may recover the remaining, appropriate and well-supported costs of $2,395.97.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that plaintiff's Motion for Post-Judgment Relief is GRANTED IN PART to award nominal damages of $1.00. The remainder of the motion is DENIED.

IT IS FURTHER ORDERED that defendant's Motion for Judgment as a Matter of Law; in the Alternative, Motion for New Trial; in the Further Alternative, Motion for Remittitur is GRANTED IN PART to order a remittitur in the punitive damages award to $80,000 or, if plaintiff refuses to accept a remittitur, to grant a new trial on punitive damages only. The remainder of the motion is DENIED. Plaintiff must advise the court and opposing counsel in writing within ten days of entry of this order whether he will accept the remittitur.

IT IS FURTHER ORDERED that plaintiff's Motion for Attorney's Fees and Costs is GRANTED IN PART in that plaintiff is awarded $70,785 in attorney's fees and $2,395.97 in costs. To the extent that more extensive awards are sought in this motion, it is DENIED.

New Orleans, Louisiana, this 22d day of February, 2002.

/s/ Joseph C. Wilkinson, Jr.
JOSEPH C. WILKINSON, JR.
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES V. JIMENEZ	CIVIL ACTION
VERSUS	NO. 00-1756
PAW-PAW'S CAMPER CITY, INC.	SECTION "N" (2)

AMENDED JUDGMENT

(Filed Feb. 25, 2002)

Considering the jury verdict dated November 16, 2001, the record, the court's prior orders and the parties' consent pursuant to 28 U.S.C. § 636(c).

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of plaintiff, James V. Jimenez, and against defendant, Paw-Paw's Camper City, Inc., in the amount of $80,001.00, together with legal interest from the date of entry of judgment, as to plaintiff's hostile work environment claim under Title VII and Section 1981.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of plaintiff, James V. Jimenez, and against defendant, Paw-Paw's Camper City, Inc., in the amount of $70,785 in attorney's fees and $2,395.97 in costs, together with legal interest from the date of entry of judgment, as to plaintiff's hostile work environment claim under Title VII and Section 1981.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of defendant, Paw-Paw's Camper City, Inc., and against

plaintiff, James V. Jimenez, dismissing all other claims asserted herein with prejudice.

New Orleans, Louisiana, this 22nd day of February, 2002.

/s/ Loretta G. Whyte
CLERK OF COURT

APPROVED AS TO FORM

/s/ Joseph C. Wilkinson, Jr.
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES V. JIMENEZ	**CIVIL ACTION**
VERSUS	**NO. 00-1756**
PAW-PAW'S CAMPER CITY, INC.	**SECTION "N" (2)**

JUDGMENT

(Filed Nov. 21, 2001)

Considering the jury verdict dated November 16, 2001, the record and the parties' consent pursuant to 28 U.S.C. § 636(c).

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of plaintiff, James V. Jimenez, and against defendant, Paw-Paw's Camper City, Inc., in the amount of $161,000.00, together with legal interest from the date of entry of judgment, defendant to bear all costs pursuant to Fed. R. Civ. P. 54(d)(1).

New Orleans, Louisiana, this 21st day of November, 2001.

CLERK OF COURT

APPROVED AS TO FORM

/s/ Joseph C. Wilkinson, Jr.
UNITED STATES
MAGISTRATE JUDGE

BY /s/ Denny P. Descant
Denny P. Descant
Chief Deputy

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30291

JAMES V JIMENEZ

Plaintiff-Appellee-Cross-Appellant

v.

PAW PAW'S CAMPER CITY INC

Defendant-Appellant-Cross-Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

---

ON PETITION FOR REHEARING EN BANC

(Filed Apr. 17, 2003)

(Opinion 3/17/03, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL*, District Judge.

---

* District Judge of the Southern District of Texas, sitting by designation.

Judge Clement did not participate in the consideration of the rehearing en banc.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States District Judge

APPENDIX F

28 U.S.C. § 1251. Original jurisdiction

(**a**) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(**b**) The Supreme Court shall have original but not exclusive jurisdiction of:

(**1**) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(**2**) All controversies between the United States and a State;

(**3**) All actions or proceedings by a State against the citizens of another State or against aliens.

(June 25, 1948, c. 646, 62 Stat. 927; Sept. 30, 1978, Pub.L. 95-393, § 8(b), 92 Stat. 810.)

APPENDIX G

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Untied States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

APPENDIX H

28 U.S.C. § 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(**1**) From a district court of the United States to the court of appeals for the circuit embracing the district;

(**2**) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(**3**) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(**4**) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

(June 25, 1948, c. 646, 62 Stat. 930; Oct. 31, 1951, c. 655, § 50(a), 65 Stat. 727; July 7, 1958, Pub.L. 85-508, § 12(g), 72 Stat. 348; Mar. 18, 1959, Pub.L. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, Pub.L. 87-189, § 5, 75 Stat. 417; Nov. 6, 1978, Pub.L. 95-598, Title II, § 237, 92 Stat. 2667; Apr. 2, 1982, Pub.L. 97-164, Title I, § 126, 96 Stat. 37.)

APPENDIX I

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

APPENDIX J

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

APPENDIX K

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

> **(1)** is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];
>
> **(2)** although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any

place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be

interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(*l*) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

---

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for

a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [*50 U.S.C.A. § 781* et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency

to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under

this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or

national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

> **(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> **(ii)** the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact,

the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (*21 U.S.C. 802(6)*), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [*21 U.S.C.A. § 801* et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or

otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws –

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had –

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and

that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to –

(A) alter the standards for intervention under *rule 24 of the Federal Rules of Civil Procedure* or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order

described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

---

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship

or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

---

42 U.S.C. § 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

APPENDIX L

United States Supreme Court Rule

PART III. JURISDICTION ON WRIT OF CERTIORARI

RULE 10. Considerations Governing Review on Certiorari

Review on a writ of certicrari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States Court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

* * *

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX M

United States Supreme Court Rule

RULE 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5.

However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be received by the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

(As amended Jan. 11, 1999, eff. May 3, 1999.)

APPENDIX N

Fifth Circuit Local Rule

FRAP 35. EN BANC DETERMINATION

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authorative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) Number of Copies. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

[Amended April 30, 1979, effective August 1, 1979; April 29, 1994, effective December 1, 1994; April 24, 1998, effective December 1, 1998.]

APPENDIX O

Federal Rule of Appellate Procedure

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

RULE 3. Appeal as of Right – How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record – excluding the appellant's – or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries – and any later docket entries – to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

APPENDIX P

Federal Rule of Appellate Procedure

RULE 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal – in

compliance with Rule 3(c) – within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined. A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

APPENDIX Q

Federal Rules of Civil Procedure

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE
FOR THE UNITED STATES DISTRICT COURTS
VI. TRIALS

Copr. © West Group 2003. No claim to Orig.
U.S. Govt. Works.

Amendments received to 05-23-03

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by

the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

APPENDIX R

Federal Rules of Civil Procedure

UNITED STATES CODE ANNOTATED FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS VII. JUDGMENT

Copr. © West Group 2003. No claim to Orig. U.S. Govt. Works.

Amendments received to 05-23-03

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended

for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Lexis

No. 03-74

Supreme Court, U.S.
FILED
JUL 2 9 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PAW-PAW'S CAMPER CITY, INC.,

Petitioner,

v.

JAMES V. JIMENEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. CHRISTIAN LEWIS
THE GLENN ARMENTOR LAW CORPORATION
300 Stewart Street
Lafayette, Louisiana 70501
Telephone: (337) 233-1471
Facsimile: (337) 233-5655
Attorney for Respondent James V. Jimenez

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE FACTS 3

REASONS FOR DENYING PAW-PAW'S WRIT 8

I. The punitive damage award was based upon the evidence and was not excessive under this Court's decisions of *Gore* and *Campbell* 8

II. The Fifth Circuit decision neither perpetuates nor creates an inter-circuit dispute regarding the relationship between punitive and compensatory damages 16

III. The Court should deny review based upon the alleged *intra*-circuit conflict within the Fifth Circuit 18

CONCLUSION 18

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES:

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996) ..... *passim*

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 8

Kolstad v. American Dental Association, 527 U.S. 526 (1999) 9

State Farm Mutual Automobile Insurance Company v. Campbell, ___ U.S. ___, 123 S.Ct. 1513 (2003) ... *passim*

OTHER CASES:

Baker v. John Morrell & Co., 2003 WL 21355198 (N.D.Iowa) 17

Cush-Crawford v. Adchem Corp., 271 F.3d 352 (2nd Cir. (N.Y.), Nov. 16, 2001) 12

Forsyth v. City of Dallas, Tex., 91 F.3d 769 (5th Cir. 1996) 12, 15

Giles v. Gen. Elec. Co., 245 F.3d 474 (5th Cir. 2001) 12

Kerr-Selgas v. American Airlines, 69 F.3d 1205 (1st Cir. 1995) 17

Louisiana Acorn Housing v. Leblanc, 211 F.3d 298 (5th Cir. 2000) 18

Mota v. University of Tex., 261 F.3d 512 (5th Cir. 2001) 8

Parrish v. Sollecito, 2003 WL 1905613 (S.D.N.Y., Apr. 16, 2003) 17

Romano v. U-Haul International, 233 F.3d 655 (1st Cir. 2000) 14

Salinas v. O'Neill, 286 F.3d 827 (5th Cir. 2002) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Swinton v. Potomac Corporation, 270 F.3d 794 (9th Cir. 2001) 14

Williams v. Trader Publ'g Co., 218 F.3d 481 (5th Cir. 2000) 12

STATUTES:

42 U.S.C. § 1981 ..... 2, 3, 14, 18

42 U.S.C. § 1981a 8, 14

42 U.S.C. § 1988 ..... 3, 19

42 U.S.C. § 2000e 2, 3

RULES:

U.S. Sup.Ct. Rule 10(a) 16, 17

OTHER:

H.R.Rep. 914, 88th Cong., 1st Sess. 18 (1963), U.S. Code Cong. & Admin. News 1964 16

BRIEF ON BEHALF OF RESPONDENT JIMENEZ IN OPPOSITION TO PAW-PAW'S CAMPER CITY, INC.'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Jimenez urges the rejection of Petitioner Paw-Paw's Camper City, Inc.'s ("Paw-Paw's") petition for writ of certiorari because it fails to present any legitimate argument why the punitive damage award affirmed by the Fifth Circuit should be overturned. Respondent submits that the punitive damage award was based upon the evidence, is an amount analogous to those authorized by Congress, and was not excessive under this Court's decisions.

Respondent adopts, for purposes of this brief, the material in Paw-Paw's Petition for Writ of Certiorari under the headings, "List of Interested Parties" and "Jurisdiction." With regard to Petitioner Paw-Paw's "Course of Proceedings and Disposition of the Case Below," Respondent notes that the Petitioner omitted the Fifth Circuit's award of costs and attorney's fees to Respondent in opposing Petitioner's appeal to that court. Further, it should be noted that no judge on the Fifth Circuit requested that the court be polled to consider Paw-Paw's request for rehearing en banc. (Paw-Paw's Petition, p. 65a)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner Paw-Paw's omitted in its presentation of "Statutory and Regulatory Provisions Involved" that

Respondent also prevailed on his hostile work environment claims under 42 U.S.C. § 1981. The statue reads as follows:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Further, 42 U.S.C. § 2000e-5(k) provides in part that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs."

Similarly, 42 U.S.C. § 1988 provides in part that "[i]n any action to enforce a provision of sections 1981 [or] 1981a . . . , the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE FACTS

The jury, composed of six Caucasians and one African-American, heard overwhelming evidence of defendant Paw-Paw's discrimination and harassment against Mr. James Jimenez in violation of his rights secured under both Title VII, 42 U.S.C. § 2000e, et seq. and 42 U.S.C. § 1981. Mr. Jimenez is Hispanic and of Mexican descent. Paw-Paw's is a regional corporation which sells large recreational vehicles throughout the Gulf South. Not only did the jury find that Paw-Paw's conduct created a hostile work environment, the district court wrote after its thorough review of the evidence that, "the court finds a high degree of reprehensibility in the repeated, extensive, ethnically hostile verbal abuse by Paw-Paw's managers that plaintiff experienced, as found by the jury." (Paw-Paw's Petition, p. 28a)

Mr. Jimenez was hired to be a salesman at Paw-Paw's Picayune, Mississippi, store in March of 1996. He was transferred to Paw-Paw's Gulfport store in August of 1996 where he eventually rose to the position of store manager. At the time that he was promoted to Gulfport's store manager, W.B. "Dub" Herring, Jr., the owner of Paw-Paw's, advised him that Paw-Paw's policy was that "We don't hire darkies." This comment placed Mr. Jimenez, as the only person of color in sales/management, on notice that he

would be under scrutiny and his performance would need to exceed that of white managers.

Subsequently, Paw-Paw's hired Mr. Matthew Margetta, who became Paw-Paw's general manager, part owner, and Mr. Jimenez's supervisor. While employed at the Gulfport store, Mr. Jimenez heard from second hand sources that racial slurs were being directed toward him. Nevertheless, his sales were good at the Gulfport store as manager.

In March of 1998, Mr. Jimenez was transferred to Paw-Paw's largest store in Mobile, Alabama, to serve as general sales manager, the store's top position. Mr. Margetta also maintained an office at the Mobile store. During this time, on the occasions that Mr. Margetta would be in a "bad mood," he would call Mr. Jimenez a "beaner" or "wetback." "Beaner" is a reference to Mexican beans and a slur used against Mexicans signifying they can only afford to eat beans. "Wetback" is a slur which labels someone as an immigrant who illegally crossed the Rio Grande River into this country. Mr. Jimenez related one occasion where Mr. Margetta cursed and yelled at him in front of customers calling him a "F – -ing Mexican." Mr. Margetta, in response to Mr. Jimenez's complaints about the name calling, advised him to not be "so sensitive." The racial slurs against him occurred about three to four times per week during the eight month period that he worked in Mobile, Alabama.

Mr. John Wimbrow, a former Paw-Paw's manager, testified that the racial slurs directed from Mr. Margetta and Chuck Markham, another manager, to Mr. Jimenez included "little Mexican," "spicenstein," "yo, spic," "yo, beaner." Mr. Wimbrow testified that "a lot of guys would

call [Mr. Jimenez] names." Mr. Wimbrow testified that Mr. Jimenez complained about the slurs and told people, particularly Chuck Markham, to "knock it off" or "that's enough."

Ms. Leslie Hall, a warranty clerk with Paw-Paw's, testified that she knew Mr. Jimenez while working together at the Picayune, Mississippi, store in 1996. After Mr. Jimenez left Picayune, she worked under Don Winchester and Matt Margetta. While working under Mr. Margetta, she heard him refer to Mr. Jimenez as a "spic." Ms. Hall also testified that Don Winchester referred to Mr. Jimenez as a "little spic." She testified that the slurs against Mr. Jimenez were used in a hostile manner.

In November of 1998, Matt Margetta advised Mr. Jimenez that he was being demoted from the Mobile store manager's position to a sales position in Hammond, Louisiana. A week before this demotion, Mr. Jimenez had complained again to Matt Margetta about the slurs. Mr. Wimbrow testified that he believed that Mr. Jimenez's "Mexican appearance" contributed to his demotion and that he was considered a "token" amongst Paw-Paw's all white sales and management staff. Racial slurs against Mr. Jimenez continued during his tenure as Hammond's store manager. Chuck Markham, the Mobile store manager, continued calling him "spic" or "spicenstein" on "quite a bit" of occasions. Mr. Margetta, Mr. Jimenez's supervisor, referred to him as "spic" and "beaner" by telephone approximately two to three times per week during this period of time. Mr. Floyd Feske, a co-employee at Hammond, also testified that he would hear Matt Margetta refer to Mr. Jimenez as "beaner" and "spic" in an ugly manner.

After Mr. Jimenez's second demotion, Mr. Wagner, the new Hammond store manager, used slurs against Mr. Jimenez also in the presence of customers. These included "wetback," "beaner" and comments in front of customers such as "Hey, got your green card in the office." On one occasion while discussing the employment application for salesperson submitted by Jermaine Washington, an African-American, Mr. Wagner reminded Mr. Jimenez that Paw-Paw's did not hire "darkies" and asked Mr. Jimenez "how the hell did you slip by?" Mr. George Rinker, a retired U.S. Navy sailor, was present during this conversation, and confirmed Mr. Wagner's slur against Mr. Jimenez in the context of rejecting Mr. Washington's application. Mr. Floyd Feske testified that he, too, heard Dave Wagner call Mr. Jimenez "spic," "greaser," "beaner," and ask Mr. Jimenez in front of the staff, "How did you get into the United States?" Mr. Feske testified that Chuck Markham, Mobile's manager, also called Mr. Jimenez a "spic." Mr. Jimenez continued to complain to Mr. Margetta about these slurs to no avail. Mr. Feske confirmed hearing Mr. Jimenez's complaints to Mr. Margetta. The slurs from both Mr. Wagner and Mr. Margetta continued until Mr. Jimenez left Paw-Paw's in July of 1999.

Ms. Tanya Strange, a Paw-Paw's employee who also worked with Mr. Jimenez in Hammond between the Fall of 1998 through March of 1999 as a warranty administrator, testified that she also heard Matt Margetta refer to Mr. Jimenez as "spic" or "little Mexican." She also heard Dave Wagner "always put Jimmy down," tell him to "go back to Mexico City," and treated Mr. Jimenez terribly. She stated Mr. Wagner talked to Mr. Jimenez like a "dog," always made "racial" comments, and treated him in a very "degrading" manner. She testified that the racial slurs

bothered Mr. Jimenez "very much" and that he became "frustrated" by and "tired" of the racial slurs. Ms. Strange also corroborated hearing that Paw-Paw's policy was not to hire people of color because they were considered by management to be "no good workers."

Paw-Paw's own witnesses corroborated the absence of any "good-faith" effort to comply with federal anti-discrimination laws. Read Doolittle, a sales manager testifying on behalf of Paw-Paw's, speculated that he heard a lot of Paw-Paw's employees use racial slurs while working. Mr. Doolittle testified that he, too, heard Chuck Markham refer to Mr. Jimenez as a "spic." Incredibly, Mr. Doolittle, a Paw-Paw's manager, did not view the use of slurs to be wrong if spoken in general conversations at work. Notably, Paw-Paw's did not produce Don Winchester, Chuck Markham, or David Wagner at trial or by deposition to deny their racial slurs. The jury, having heard the above testimony, obviously rejected Paw-Paw's owner Matt Margetta's denial of using slurs. Paw-Paw's remaining witnesses, most of whom were current employees, only testified that they personally were not present when slurs were used but were not able to testify that the slurs said out of their presence did not in fact occur. Mr. W.B. Herring, Paw-Paw's president, in addition to having a "no hiring of darkies" policy, exemplified Paw-Paw's reckless indifference to stopping workplace discrimination by admitting in his March 2001 deposition that he was unaware whether Paw-Paw's even had a procedure by which employees could lodge a harassment complaint. Matt Margetta, the general manager in charge of corporate operations and part owner, demonstrated his own intentional malice and reckless indifference by engaging in

the very same racist conduct that was purportedly prohibited by the policy he drafted.

REASONS FOR DENYING PAW-PAW'S WRIT

Paw-Paw's presents to this Court many of the same arguments which have already been rejected by the jury, the district court, and the Fifth Circuit. Paw-Paw's writ should be denied because (1) the Fifth Circuit correctly affirmed both the jury's and district court's finding of a hostile work environment, (2) the $80,000 punitive damage award was not excessive under this Court's decisions, and (3) the Fifth Circuit decision neither perpetuates nor creates an inter-circuit dispute regarding the relationship between punitive and compensatory damages.

I. The punitive damage award was based upon the evidence and was not excessive under this Court's decisions of *Gore* and *Campbell*.

A. The Fifth Circuit correctly affirmed the jury's and the district court's finding that Paw-Paw's subjected Mr. Jimenez to a hostile work environment.

A hostile work environment exists if the harassment is sufficiently severe and pervasive enough that a reasonable person would find it to be hostile. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-789 (1998). Discriminatory verbal intimidation, ridicule, and insults may be sufficient to create an abusive working environment that violates Title VII. *Mota v. University of Tex.*, 261 F.3d 512, 524 (5th Cir. 2001). Section 1981a authorizes the assessment of

punitive damages against an employer who subjects an employee to a hostile work environment.

After receiving an instruction consistent with this Court's decision of *Kolstad v. American Dental Association,* 527 U.S. 526 (1999), the jury assessed punitive damages against Paw-Paw's due to its malicious and reckless indifference to Mr. Jimenez's federally protected rights. As set forth above in the Statement of Facts, the overwhelming evidence established that Paw-Paw's ownership/management not only knew that race and national origin harassment was prohibited by law but Paw-Paw's ownership/highest management engaged in same against Mr. Jimenez up to two to three times per week throughout much of his employment. Both the district court and the Fifth Circuit correctly confirmed the jury's finding of a hostile work environment only after an extensive and proper review of the record. Paw-Paw's petition should be denied because it ignores the evidence and requests this Court to do the same.

B. The $80,000 punitive damage award upheld by the Fifth Circuit is not excessive under this Court's decisions of *Gore* and *Campbell.*

The $80,000 punitive damage award upheld by the Fifth Circuit is not excessive under either of this Court's decisions of *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 1601 (1996) or *State Farm Mutual*

Automobile Insurance Company v. Campbell, ___ U.S. ___, 123 S.Ct. 1513 (2003) as asserted by Paw-Paw's.[1]

In *Gore*, the Supreme Court stated that a jury has considerable latitude in granting punitive damages, which will be overridden as a due process violation "only when an award can be fairly characterized as 'grossly excessive'" in relation to the "State's legitimate interests in punishment and deterrence." *Gore* at 568. This Court in *Gore* emphasized that the award was excessive because it overreached, that is (1) defendant BMW did not have adequate notice that its conduct actually violated Alabama's statute, (2) BMW did not have notice of the magnitude of the punishment Alabama may impose on minor infractions, and (3) the award represented Alabama's attempt to dictate the policies of the other 49 states by punishing BMW for conduct occurring in other states. *Id.* at 571-573, 577-578.

In *Campbell*, this Court, applying *Gore*'s three guideposts, vacated the punitive damage award only after it determined that the award impermissibly punished defendant State Farm for conduct that "bore no relation to" the claims actually before the trial court. *Id.* at 1523.

Here, unlike *Gore* and *Campbell*, the punitive damage award is directly related to Paw-Paw's reprehensible conduct toward Mr. Jimenez. The "overreaching" found in

---

[1] The district court misapplied *Gore's* three guideposts in reaching the decision to remit the jury's award of $161,000 to $80,000. Respondent Jimenez submits in his cross-petition for writ of certiorari that the application of *Gore*'s three guidepost analysis to this award was unnecessary; further, if such an analysis was necessary, the remittitur was improper under *Gore* and the jury's punitive damage award of $161,000 should be reinstated.

Gore and *Campbell* is not present here. Paw-Paw's baseless assertion that it was punished for its discrimination against Mr. Jermaine Washington ignores that the evidence of same was inseparably related to harassment directed at Respondent Jimenez. As stated above, Dave Wagner, in the context of rejecting Mr. Washington's application pursuant to Paw-Paw's "no darkies" policy, asked Mr. Jimenez how he, being a person of color, "slipped by" Paw-Paw's prohibition against hiring people of color for sales positions. Moreover, ample evidence established that Paw-Paw's conduct was deserving of punishment independent of any discrimination related to Mr. Washington. Therefore, the punitive damage award was proper under *Gore's* first guidepost.

Under *Gore*'s second guidepost, the punitive damage award affirmed by the Fifth Circuit should be proportionate to either the actual *or* the "potential" harm that could have arisen from Paw-Paw's reprehensible conduct. *Gore, supra,* at 502. Paw-Paw's petition completely ignores the "potential harm" analysis under *Gore's* second guidepost. *Gore's* accounting for the "potential harm" to a plaintiff allows a trier of fact to punish an offender whose conduct is horrendous but may not result in calculable harm.[2] Analyzing the ***potential*** harm is critically important in discrimination cases because the offending employer should not escape punitive damages because the victim suffered little or no damages due to his own durability,

---

[2] A hypothetical gunman who shoots into a crowd yet miraculously hits no one should not escape punitive damages under *Gore* since the "potential harm" was great and the conduct reprehensible.

mental strength or ability to obtain another job with equal or better pay.[3]

The ***potential*** harm to Mr. Jimenez can be found by reviewing the amounts awarded for actual harm to plaintiffs in discrimination cases in the Fifth Circuit. In *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002), the Fifth Circuit surveyed several decisions affirming awards for actual harm to victims of discrimination. The *Salinas* court noted the $100,000 for emotional damages to the plaintiff in *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996), $100,000 to the plaintiff in *Williams v. Trader Publ'g Co.*, 218 F.3d 481 (5th Cir. 2000) for emotional distress due to "sleep loss," "severe loss of weight," and "beginning smoking," and $150,000 to the plaintiff in *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) for emotional damages arising from a failure to rehire. *Salinas* at 831. The Fifth Circuit in *Salinas* ultimately awarded $150,000 to the plaintiff for emotional damages.

A survey of these four comparable Fifth Circuit decisions establishes that the *potential* harm Mr. Jimenez could have suffered included depression, marital trouble, headaches, loss of prestige and social connection, despondence, discouragement, intestinal problems, and commencement

---

[3] See *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352 (2nd Cir. (N.Y.), Nov 16, 2001) where the Second Circuit noted that the "unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm." There, the Second Circuit affirmed a punitive damage award of $100,000 and $0 in compensatory damages or a 100,000 to 0 ratio.

of addictive habits such as smoking.[4] They likewise show that the potential harm to Mr. Jimenez is valued between $100,000 and $150,000 in the Fifth Circuit. The conduct in these four decisions is materially identical to, or even less severe than that suffered by Mr. Jimenez. Salinas did not get a promotion; Forsyth was transferred; Williams was fired, not repeatedly harassed; and Giles was simply rejected for rehire based on a disability, but was not harassed. *See Salinas,* 286 F.3d 827 (5th Cir. 2002). This discrimination pales in comparison to that to which Paw-Paw's subjected Mr. Jimenez. Given the "potential" or "likely harm" of $100,000 to $150,000, the subject $80,000 punitive damage award yields a ratio of 1 to 1.25 or 1 to 1.87.[5] These ratios are unassailable on constitutional grounds and are consistent with both *Gore* and *Campbell.*

Applying *Gore's* third guidepost also refutes any assertion that the punitive damage award upheld by the Fifth Circuit was excessive. *Gore* and *Campbell* require a comparison between the punitive damage award and "analogous" civil penalties that are "authorized" for similar misconduct, not just only those actually "imposed." *Gore* at 583.

---

[4] Evidence was presented that as a result of the harassment, Mr. Jimenez physically suffered sleep deprivation, abused alcohol and was diagnosed by Dr. Burl Forgey, psychiatrist, as suffering from "major depression" consistent with someone who has undergone the stressors of racial slurs and discrimination in the workplace.

[5] $80,000/$100,000 = 1/1.25 or $80,000/$100,000 = 1/1.87

Congress has authorized the award of $80,000 expressly and implicitly. Congress in employment harassment cases has specifically authorized awards up to $300,000, inclusive of punitive damages, in Section 42 U.S.C. § 1981a(b)(3)(D). While the damages authorized under 42 U.S.C. § 1981a are not directly applicable to Mr. Jimenez's Section 1981 claims, they are ***analogous*** and do indicate that an award of $80,000 is well within the universe of punitive awards that has been contemplated by Congress. Such a comparison occurred in *Swinton v. Potomac Corporation*, 270 F.3d 794, 820 (9th Cir. 2001), where the appellate court expressly viewed Congress's authorization of $300,000 in damages under Title VII as providing an analogous example of damages to which a court can compare the propriety of a punitive damage award under a § 1981 action as required by *Gore's* third guidepost.[6] The Ninth Circuit ultimately affirmed the jury's award of $1,000,000 in punitive damages for the employment race discrimination claims before it. *Id.*

Moreover, 42 U.S.C. § 1981a(b)(1) contains no language requiring any award of compensatory damages as a prerequisite to awarding punitive damages. Further, Congress has placed no limitations on the amount of damages, either compensatory or punitive, which can be awarded in a 42 U.S.C. § 1981 action nor established any ratio which must exist between these damages. Further, the Fifth Circuit has affirmed awards of $125,000 and

---

[6] See also *Romano v. U-Haul International,* 233 F.3d 655, 673 (1st Cir. 2000), holding a punitive damage award that comports with a statute "provides strong evidence that a defendant's due process rights have *not* been violated." (emphasis supplied)

$750,000 in exemplary damages in *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996), further evidencing that $80,000 or even the jury's $161,000 is constitutionally sound.[7] As such, Paw-Paw's errs in requesting this Court to impose a ratio or a cap that was not contemplated by Congress particularly since *Gore* admonishes that "substantial deference" should be accorded to "legislative judgments" concerning the appropriate degree of punishment for the conduct at issue. *Gore* at 583.

Paw-Paw's petition also ignores this Court's instruction that there are "no rigid benchmarks that a punitive damages award may not surpass" and that "ratios greater than those we have previously upheld may comport with due process where a 'particulary egregious act has resulted in only a small amount of economic damages.'" *Campbell* at 1524 citing *Gore*. This Court has also held that "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach." *Gore* at 1602. Respondent submits that discrimination cases exemplify the type of case where higher ratios should be permitted given the difficulty in calculating the actual damages caused by racist conduct.

---

[7] Page 24 of Paw-Paw's petition misstates the district court's finding. The district court did **not** hold that $80,000 was the highest employment punitive damage award in the Fifth Circuit as asserted by Paw-Paw's. The district court simply stated that 80,000 to 1 was the highest **ratio** it found in the reported Fifth Circuit cases. (Paw-Paw's petition, p. 34a)

Finally, it is impossible to conclude that the $80,000 affirmed by the Fifth Circuit is an amount that "shocks the conscience" when this amount represents less than one month of Paw-Paw's gross ***profit***. Assessing such an award only prevents Paw-Paw's owners from enjoying the benefits of profits it earns over a mere three week period. This represents barely a slap on the wrist by most standards, not a constitutional violation. Any reduction of the jury award moots the intent of punitive damages which are "aimed at deterrence and retribution." *Campbell* at 1520.

The Civil Rights Act was aimed at "eradicating significant areas of discrimination on a nationwide basis." H.R.Rep. 914, 88th Cong., 1st Sess. 18 (1963), U.S. Code Cong. & Admin. News 1964, pp. 2355, 2393. Ultimately, Paw-Paw's petition fails under both *Gore* and *Campbell* because the modest punitive damage award is not "grossly excessive" in relation to the Nation's interest in eradicating the gross racism embraced by Paw-Paw's.

II. The Fifth Circuit decision neither perpetuates nor creates an inter-circuit dispute regarding the relationship between punitive and compensatory damages.

Rule 10 of this Court provides, in part, that a writ will be considered if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." U.S. Sup.Ct. Rule 10(a). No such conflict exists here.

Paw-Paw's cites only one First Circuit case and two district court cases to support an alleged conflict between

those courts and the Second and Fifth Circuits regarding the relationship between punitive and compensatory damages and the application of *Gore*. A review of these cases demonstrates no conflict exists. The First Circuit in *Kerr-Selgas v. American Airlines*, 69 F.3d 1205 (1st Cir. 1995) vacated the punitive damage award because there had not been a timely request for nominal damages. *Id.* at 1214-15. Here, the Fifth Circuit properly affirmed the punitive damage award because the district court had granted a timely request for nominal damages. As such, no conflict exists between this matter and *Kerr-Selgas*. Moreover, the First Circuit in *Kerr-Selgas* was silent as to *Gore* and offered no application of same which could be inconsistent with the district court's application of *Gore* as upheld by the Fifth Circuit.

Similarly, neither of the two district court cases cited by Paw-Paw's – *Parrish v. Sollecito*, 2003 WL 1905613, (S.D.N.Y., Apr 16, 2003) or *Baker v. John Morrell & Co.*, 2003 WL 21355198 (N.D.Iowa) – present a conflict with the Fifth Circuit's decision in this matter. To the contrary, both support the Fifth Circuit's decision and each upholds punitive damage awards greater than that awarded to Mr. Jimenez. In *Parrish*, the district court ordered the plaintiff to accept a remittitur of the punitive damage award from $500,000 to $135,000 or request a new trial. In *Baker*, the district court entered an award of $300,000 in punitive damages after determining that same was not excessive under *Gore*. Assuming *arguendo* that either case presents a conflict, neither are court of appeals' decisions which would qualify under Rule 10(a) as a basis for granting Paw-Paw's petition. The conclusion is inescapable that Paw-Paw's petition fails to present any inter-circuit "conflict" as contemplated by this Court's Rule 10.

III. The Court should deny review based upon the alleged *intra*-circuit conflict within the Fifth Circuit.

Paw-Paw's curiously argues that this Court should vacate the Fifth Circuit decision in this matter because it allegedly conflicts with the earlier Fifth Circuit decision of *Louisiana Acorn Housing v. Leblanc*, 211 F.3d 298 (5th Cir. 2000). First, U.S. Sup.Ct. Rule 10 makes no provision for this Court to review matters based only upon an alleged *intra*-circuit conflict. Second, the present matter is distinguishable from *Louisiana Acorn* inasmuch as the constitutional violation absent there was present here. Moreover, *Louisiana Acorn* addressed a claim under the Fair Housing Act, not Title VII or Section 1981. Finally, assuming *arguendo* that a conflict did exist between two Fifth Circuit panel opinions, the Fifth Circuit appears to have resolved any conflict in favor of Respondent Mr. Jimenez. This is evident since Paw-Paw's raised its *Louisiana Acorn*-based argument in its petition for rehearing en banc yet no member of the Fifth Circuit, including the two panel members who decided *Louisiana Acorn*, requested that the court be polled in denying Paw-Paw's petition for rehearing en banc. (Paw-Paw's petition, p. 65a).

CONCLUSION

For the foregoing reasons, Respondent Jimenez submits that Paw-Paw's petition for writ of certiorari is without merit and should be denied inasmuch as the jury's finding of a hostile work environment is supported by the evidence. Moreover, the punitive damages award upheld by the Fifth Circuit was not excessive under this Court's decisions of *Gore* and *Campbell*. Paw-Paw's also fails to

demonstrate that the Fifth Circuit decision conflicts with any other court of appeals' decision. Mr. Jimenez seeks additional attorney's fees, costs and expenses under 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988 made necessary in opposing Paw-Paw's petition for certiorari and he reserves the right to pursue same before the appropriate forum.

Respectfully submitted,

J. CHRISTIAN LEWIS
THE GLENN ARMENTOR LAW CORPORATION
300 Stewart Street
Lafayette, Louisiana 70501
Telephone: (337) 233-1471

(3)

Supreme Court, U.S.
FILED
AUG 27 2003
OFFICE OF THE CLERK

No. 03-74

In The

Supreme Court of the United States

PAW PAW'S CAMPER CITY, INC.,

Petitioner,

v.

JAMES V. JIMENEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

LARRY G. CANADA
Counsel of Record
DORIS T. BOBADILLA
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
701 Poydras St., Suite 4040
New Orleans, Louisiana 70139
Telephone: (504) 525-6802
Facsimile: (504) 525-2456
Attorneys for Petitioner Paw Paw's Camper City, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE FACTS 1

REPLY POSITION IN SUPPORT OF GRANTING PAW PAW'S WRIT OF CERTIORARI 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996) 3, 4, 7

Deters v. Equifax Credit Information Services, Inc., 981 F.Supp. 1381 (10th Cir. 1997) 7

Johanson v. Combustion Engineering, Inc., 170 F.3d 1320 (C.A.11 1999) 7

Kinslow v. American Postal Workers Union, Local Chicago, 222 F.3d 269 (7th Cir. 2000) 7

Lee v. Edwards, 101 F.3d 805 (2nd Cir. 1996) 7

Ross v. Kansas City Power and Light Co., 293 F.3d 1041 (8th Cir. 2001) 7

State Farm Mutual Automobile Insurance Company v. Campbell, ___ U.S. ___, 123 S.Ct. 1513 (2003) 3, 7

Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001) 7

STATUTES:

42 U.S.C.A. § 1981(b)(3) 6

PAW PAW'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

Petitioner, Paw Paw's Camper City, Inc. (hereinafter "Paw Paw's"), hereby incorporates, for the purposes of this brief, the information provided in the Petition for Writ of Certiorari sections labeled: "Questions Presented," "List of Interested Parties," "Corporate Disclosure Statement," "Jurisdiction," "Statutory and Regulatory Provisions Involved," and "Statement of Issues Presented." Paw Paw's is satisfied to incorporate the section from the Petition for Writ of Certiorari entitled "Course of Proceedings and Disposition of the Case Below" with the additions suggested in the corresponding section of Respondent's Brief in Opposition to Petition for Writ of Certiorari. (Jimenez's Response, p. 1).

STATEMENT OF THE FACTS

Petitioner, Paw Paw's, hereby incorporates its Petition for Writ of Certiorari and Response to Conditional Cross Petition for Writ of Certiorari and thereby adopts, for purposes of this brief, its original Statement of the Facts. However, Paw Paw's corrects the following information relayed in its "Course of Proceedings and Disposition of the Case Below" section. In said section of the original Writ of Certiorari, Paw Paw's submitted that its post-trial motions were filed on November 27, 2002. As a correction, Paw Paw's submits it filed said motions on November 27, 2001. Thus, Paw Paw's timely sought review.

In reply, Paw Paw's submits that Respondent, James V. Jimenez's ("Jimenez") Brief in Opposition to Petition for

Writ of Certiorari asserted certain erroneous facts. In his submission, Jimenez went to great lengths to portray Paw Paw's and its owners as racists. Specifically, Jimenez contends he was the "only person of color in sales/ management." (Jimenez's Response, p. 3). Remarkably, Jimenez ignores that his brother, David Jimenez, was not only a "person of color in sales/management," but that his brother, an Hispanic American, partially owned the company at the time Jimenez was hired. Jimenez's blatant attempt to ignore his brother's heritage and ownership interest is erroneous and refutes Jimenez's assertions of sweeping, calculated racism at Paw Paw's.

Additionally, the Jimenez brothers were not the only minorities that were employed in management at Paw Paw's. In his response, Jimenez asserted he was the only minority present in Paw Paw's "all white sales and management staff." (Jimenez's Response, p. 5). Again, such an assertion ignores other employees' ethnic heritage. Even after the untimely death of David Jimenez, minorities continued to be employed as management staff at Paw Paw's. Ironically, Jimenez's alleged main abuser, Matt Margetta, General Manager and part owner, testified to and acknowledged his Italian heritage. In no uncertain terms, though Jimenez continues to paint a skewed picture, he was not the only Paw Paw's minority employee or management member.

Furthermore, W. B. Herring, Jr. and Matt Margetta repeatedly denied any such intentional discrimination or reprehensible conduct. At trial, both Mr. Herring and Mr. Margetta testified and specifically denied intentional and non-intentional discrimination. In support, aside from argument, Jimenez has failed to present sufficient evidence of this alleged intentional wrong doing. Consequently,

Jimenez's intentional discrimination arguments should continue to be dismissed as unfounded, as the jury verdict indicated.

REPLY POSITION IN SUPPORT OF GRANTING PAW PAW'S WRIT OF CERTIORARI

Jimenez erroneously contends that the $80,000 punitive damage award, despite the jury's award of no actual damages and final actual damages of one dollar as awarded by the judge through additur, is not in conflict with the binding decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1601 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003). In doing such, Jimenez critically misplaces the focus of the Due Process analysis on the concept of overreaching, while ignoring the central issue in both controlling decisions: the arbitrary deprivation of a citizen's property as unconstitutional. This Honorable Court, in *BMW*, established three guideposts for determining whether a punitive damage award is excessive, only after amplifying the purpose of the guideposts by stating that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose." *BMW* at 574 and *State Farm* at 1520. As such, the decisions of *BMW* and *State Farm* are not only binding and applicable in this case, but dictate that the $80,000 punitive damage award to Jimenez is grossly excessive, as it is unjustified at the incredibly disproportionate ratio of 80,000 to 1.

Jimenez consistently theorizes that the finding of no actual harm is of no moment and that punitive damages can fairly be based on potential harm to the plaintiff when no actual harm is found. In contradiction, Paw Paw's submits while "potential harm" is mentioned in the second *BMW* guidepost, the term is not meant as a panacea by which plaintiffs who have neglected to prove actual harm may still justify an otherwise unsupportable, disproportionate and unconstitutional punitive damage award. Under Jimenez's analysis, he should be allowed to capitalize on actual damage awards which have been proven and supported in other cases, by other plaintiffs and under other facts, despite his total inability to prove actual harm to himself. In the interests of fairness and equity, the proportionality of Jimenez's punitive damage award must be reviewed in light of his own actual damage award, not actual damage awards rendered in other cases. Paw Paw's asserts the potential harm factor in an analysis must be supportable, specifically quantifiable, and inextricably linked to the particular plaintiff, or otherwise be a gross example of the very arbitrary deprivation of property that the *BMW* decision is meant to extinguish.

Jimenez asserts adjusting the actual damage award to account for potential harm and not restricting punitive damage awards to amounts that are proportionate to the actual damage award "allows a trier of fact to punish an offender whose conduct is horrendous but may not result in calculable harm." (Jimenez's Response, p. 11). Paw Paw's contends this particular case is a prime example of an instance where actual damages, if they had been present, would have been easily identifiable and calculable. At trial, Jimenez offered evidence to the jury concerning actual damages. Jimenez presented figures depicting

alleged past lost wages, possible negative impact of the alleged conduct on his future earning potential, and testimony of a doctor concerning the effects of the alleged conduct on Jimenez's mental state. Despite enjoying ample opportunity, Jimenez failed to prove actual damages because all of the aforementioned evidence was categorically rejected by the jury.

Jimenez erroneously contends the punitive damage award is "directly related" to "the reprehensible conduct toward Mr. Jimenez," by Paw Paw's staff. (Jimenez's Response, pp. 10-11). Paw Paw's maintains that had any such "direct relationship" been established at trial, an award of actual damages would have been made in favor of Jimenez, but instead Paw Paw's has been punished through the incredibly disproportionate punitive damage award for conduct that logically, considering the nominal amount of actual damages, cannot be linked to Jimenez personally. However, no such actual damage award was made by the jury, though actual damages would have been simple to calculate, and only a nominal amount of one dollar was awarded by the judge. Therefore, any punitive damages leveled against Paw Paw's must be for conduct unrelated to Jimenez personally because no personal harm to Jimenez was established at trial. The only other plausible explanation is that if the alleged conduct against Jimenez is the supporting basis for the punitive damage award, the punitive damage award is improper. If the conduct of Paw Paw's was not egregious enough to cause actual harm to Jimenez, the conduct certainly cannot be egregious enough to warrant punitive damages.

Jimenez proposes that an arbitrary deprivation of property cannot be present in this case because Congress has authorized punitive damage awards up to $300,000.00.

However, proper reading of applicable guidelines recognizes limitations govern such awards. Specifically, 42 U.S.C.A. § 1981(b)(3) provides:

> The sum of the amount of compensatory damages awarded under the section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.00;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of the 20 or more calendar weeks in the current or preceding calendar year, $100,000.00;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000.00; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.00. 42 U.S.C.A. § 1981(b)(3).

Paw Paw's does not meet the requirements for a $300,000.00 punitive award. In short, Paw Paw's did not employ in excess of 500 employees during the requisite time period. Though Congress has authorized awards of $300,000.00, such awards have been "authorized" in conjunction with the size of the respondent's work force and the gravity of the conduct, reserving the highest

awards for the most egregious cases of discrimination. Consequently, Jimenez has misinterpreted the "authorized" punitive damage awards, as they conceivably could not apply to Paw Paw's, because Paw Paw's work force did not mandate maximum award figures (at fewer than 200 employees), nor could the maximum punishment be fairly exacted against Paw Paw's. Paw Paw's submits that interests of fairness dictate that a maximum penalty only be awarded in cases where conduct is at least egregious enough to be recognized as actual harm to the plaintiff.

Finally, Jimenez's denial of the existing inter-circuit conflict must be discredited. Paw Paw's has supported the assertion of an inter-circuit conflict with recent case law, with which Jimenez takes exception, in order to emphasize the role of the *State Farm* decision in current jurisprudence. However, in addition to the cases referred to in the Petition for Writ of Certiorari, Paw Paw's submits that many additional cases indicate the presence of an inter-circuit conflict regarding the proper application of *BMW* and/or *State Farm*, including (not an exclusive list): *Johanson v. Combustion Engineering, Inc.*, 170 F.3d 1320 (C.A.11 1999), *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), *Deters v. Equifax Credit Information Services, Inc.*, 981 F.Supp. 1381 (10th Cir. 1997), *Kinslow v. American Postal Workers Union, Local Chicago*, 222 F.3d 269 (7th Cir. 2000), *Lee v. Edwards*, 101 F.3d 805 (2nd Cir. 1996), *Ross v. Kansas City Power and Light Co.*, 293 F.3d 1041 (8th Cir. 2001). Paw Paw's recognizes the diversity of circumstances present in aforementioned cases; however, the application of *BMW* has undoubtedly produced wide-ranging results that call for further clarification and direction.

CONCLUSION

For the foregoing reasons, Petitioner, Paw Paw's Camper City, Inc., prays the Writ of Certiorari be granted. Through the ruling in this case, Paw Paw's has been punished in contradiction to the applicable case law. Petitioner respectfully requests Certiorari be granted and, upon consideration of the issues and arguments raised in its Petition and herein, the nominal and punitive damage awards, as well as the award of attorney's fees and costs against Paw Paw's, be vacated.

Respectfully submitted,

LARRY G. CANADA
Counsel of Record
DORIS T. BOBADILLA
GALLOWAY, JOHNSON, TOMPKINS,
BURR & SMITH
701 Poydras St., Suite 4040
New Orleans, Louisiana 70139
Attorneys for Petitioner,
Paw Paw's Camper City, Inc.